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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-188

THE BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA, ROBERT KIRK WALKER, Mayor, CHARLES "PAT" ROSE, and GENE ROBERTS, Commissioners, and WILLIAM H. ZACHRY, City Auditor,

Petitioners,

vs.

JAMES JONATHAN MAPP, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EUGENE N. COLLINS
CITY ATTORNEY
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
Attorney for Petitioners

COURT PRINTING SERVICE, INC. — 609 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
INTRODUCTORY PRAYER	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	12
APPENDIX:	
Opinion of the United States District Court for the Eastern District of Tennessee, Southern Division	14
Order of the United States District Court for the Eastern District of Tennessee, Southern Division	25
Opinion of the United States Court of Appeals for the Sixth Circuit, October 11, 1972	28
Opinion of the United States Court of Appeals for the Sixth Circuit, en banc, —— F.2d —— (April 30, 1973)	73

TABLE OF AUTHORITIES

Cases:	Page
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	9
Bradley v. *Milliken*, — F.2d — (6th Cir. 1973)	11, 12
Bradley v. *School Board of City of Richmond*, 383 U.S. 103 (1965)	3
City of Kenosha v. *Bruno*, 37 L.Ed. (2d) 109, 41 L.W. 4819 (June 11, 1973)	12
Federal Trade Commission v. *Rubberoid Co.*, 343 U.S. 470 (1952)	8
Goss v. *Board of Education of City of Knoxville*, 340 F. Supp. 711 (E.D. Tenn. 1972)	11
Goss v. *Board of Education of City of Knoxville*, 6th Circuit Court of Appeals *en banc*, (Nos. 72-1766, 1767) decided July 18, 1973	12
Grannis v. *Ordean*, 234 U.S. 385 (1914)	9
Mapp v. *Board of Education of City of Chattanooga*, — F.2d — (6th Cir. 1973)	6
Mapp v. *Board of Education of City of Chattanooga*, 373 F.2d 75 (6th Cir. 1967)	3
Mapp v. *Board of Education of City of Chattanooga*, 319 F.2d 571 (6th Cir. 1963)	3
Mapp v. *Board of Education of City of Chattanooga*, 295 F.2d 617 (6th Cir. 1961)	3
Mullane v. *Central Hanover B. T. Co.*, 339 U.S. 306 (1950)	9
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. (2d) 554	12
Zenith Radio Corp. v. *Hazeltine Research*, 395 U.S. 100 (1969)	8, 9

Other Authorities: Page

20 U.S.C. § 1655 12
42 U.S.C. § 1983 3
28 U.S.C. § 1343 (3) 3
28 U.S.C. § 1254 (1) 2
Rule 19, Federal Rules of Civil Procedure 11-12

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No. _____

THE BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA, ROBERT KIRK WALKER, Mayor, CHARLES "PAT" ROSE, and GENE ROBERTS, Commissioners, and WILLIAM H. ZACHRY, City Auditor,

Petitioners,

vs.

JAMES JONATHAN MAPP, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, a majority of the Board of Commissioners of the City of Chattanooga, Tennessee, and the City Auditor, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 30, 1973.

OPINION BELOW

The *en banc*, *per curiam* opinion of the Court of Appeals, not yet reported, appears in the appendix at pp. 73-90. The Court of Appeals affirmed the judgment of the United States District Court for the Eastern District of Tennessee. The District Court's order and opinion were filed on February 4, 1972 and the opinion appears at 341 F. Supp. 193.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit were entered on April 30, 1973. No petition for rehearing of that opinion was filed and this petition for certiorari is filed within ninety days of April 30, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May a District Court legally order a city's local government to appropriate funds to pay for the purchase, maintenance and operation of a school bus system to promote a board of education's desegregation plan if the city was not a party defendant when such order of desegregation was entered and without the city ever having been given an opportunity to be heard?

STATEMENT OF THE CASE

This suit was originally filed on April 6, 1960, by the respondents as a class action against the members of the Board of Education of the City of Chattanooga and its Superintendent of Schools. The respondents sought to enjoin those defendants from "operating a compulsory bi-

racial school system" in Chattanooga. The respondents' complaint was based on alleged violations of 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment and jurisdiction of the District Court was founded on 28 U.S.C. § 1343 (3). After a remand by the Court of Appeals, *Mapp* v. *Board of Education of the City of Chattanooga*, 295 F.2d 617 (6th Cir. 1961), the District Court approved a gradual desegregation plan. This plan was approved by the Sixth Circuit, *Mapp*, *supra*, 319 F.2d 571, 573 (1963), where the Court found that "All parties appear to find this broad scheme of desegregation acceptable." Yet on March 29, 1965, the respondents filed a motion for further relief seeking to enjoin the defendant School Board from making decisions on the basis of race. Although the respondents failed to sustain their allegations that the defendant Board of Education had made decisions on the basis of race, the District Court accelerated the plan so that all grades would be desegregated as of September, 1966. The respondents appealed to the Sixth Circuit and that Court affirmed the District Court, with the exception of the faculty desegregation issue. *Mapp*, *supra*, 373 F.2d 75 (1967). (This Court's decision in *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103 (1965) had been decided while the case on appeal.) *Neither* respondents nor the Board of Education *sought certiorari* from this Court with regard to *any* of the above decisions of the Court of Appeals.

Nonetheless, the respondents filed a motion for further relief on December 31, 1968, and a motion for immediate relief on November 14, 1969. An evidentiary hearing was held on these motions in April and May of 1971, and at the conclusion of such hearing the District Judge in an oral opinion ordered the defendant Board of Education to submit another plan of desegregation. The defendant Board of Education was instructed that all of its decisions

with regard to the new plan should be made so that the plan would "maximize integration." The plan was presented by the defendant Board of Education pursuant to such instructions and the respondents objected to all schools whose proposed student bodies fell outside of the racial balance of 30%-70%. (All other schools were designed to have at least 30% and no more than 70% of each race present in its student body.) After a hearing on the validity of the proposed plan, the District Judge approved the plan against the respondents' objections and ordered the plan implemented to the extent the Board could financially do so. The District Court's opinion, dated July 26, 1971, is reported at 329 F. Supp. 1374. The N.A.A.C.P. first, and then the Board of Education, appealed the District Court's decision.

The Board of Education, through its members, by private act of the Tennessee legislature operates the Public School System within the City of Chattanooga, Tennessee. The City of Chattanooga is governed by a mayor and four commissioners, who form the Board of Commissioners for the City of Chattanooga. The Board of Education is an *independent* Board and the City's Board of Commissioners by law do not and cannot control the Board of Education. It is the Board of Commissioners and they alone that have the power to levy taxes and appropriate moneys.

In December of 1971, a Chattanooga taxpayer filed an action in State court seeking to enjoin the Commissioners of the City of Chattanooga and its auditor from appropriating city funds to the Board of Education for the purpose of bussing to promote a racial balance. (The members of the Board of Education were not made parties to the State court suit.) In addition to a separation of powers defense, the petitioners also defended on a number of grounds, two of which were the fact that this matter was

previously before the United States District Court sitting at Chattanooga and that the Tennessee statute relied upon by the plaintiff was void under this Court's decisions. Notwithstanding such defenses, the State court on January 18, 1972, enjoined the City officials from spending any moneys to finance the transportation program currently underway at the elementary school level. On January 26, 1973, the respondents filed a petition in the federal court proceeding to join as party defendants the State court plaintiffs and defendants. This was done on the same day and all new parties were served with process that afternoon. A show cause hearing was had on the validity of the State court order two days later, January 28, 1972. At the hearing the City Attorney, representing the City officials, stated that the State court order was unconstitutional and did not oppose the District Court's orally enjoining all State court parties from giving any effect to the State court injunction.

In a written order and opinion of February 4, 1972, 341 F. Supp. 193, the District Court formally enjoined all parties from giving effect to the State court order and in addition ordered that the entire elementary and junior high portions of the Board's desegregation plan be fully implemented no later than the Fall term of school, 1972. On February 11, 1972, the Board of Commissioners filed a motion for new trial or rehearing, the thrust of which was whether the Board of Commissioners could be required to pay for the implementation of the bussing program required under the defendant Board's new desegregation plan, which had only been partially implemented, without having been made parties to the proceeding at the time the plan was ordered and approved, and without having been given an opportunity to be heard on the merits. A number of related questions were presented as to whether the City Commission had any discretion with

regard to such a request for funds by the Board of Education. The crux of the motion for new trial or rehearing and the supporting brief was the validity of the District Court ordering that the City of Chattanooga be financially responsible for such plan without having been made parties and without the Board of Commissioners having been afforded an opportunity to be heard on the merits of the desegregation order and plan. The District Court on February 25, 1972, without a hearing, denied the motion by stating that the matters were on appeal to the Court of Appeals, evidently because of the respondents' appeal of August 1971 and the Board of Education's appeal of September 1971 from the District Court's approval of the desegregation plan. The petitioners thereupon filed their appeal, presented and argued the legality of the District Court's action in the factual circumstances outlined above. However, this issue was not dealt with by the *per curiam* majority but was discussed in the dissenting opinion of the Court of Appeals. *Mapp* v. *Board of Education of the City of Chattanooga*, —— F.2d —— (6th Cir. 1973).

REASONS FOR GRANTING THE WRIT

1. The District Court's opinion conflicts with decisions of this Court.

Although the respondent N.A.A.C.P. has known from the beginning of this suit in 1960 that the Board of Education was an independent Board which did not have the power to levy taxes and was fiscally dependent upon the City of Chattanooga, as well as other governmental sources, for funds to operate the school system, the respondents did not seek to add the City of Chattanooga, through its mayor and commissioners, as party-defendants in this case. The

Board of Commissioners is the legislative body for the City of Chattanooga and they alone have the municipal power to levy taxes and appropriate moneys to the various governmental functions within the City of Chattanooga. Respondents did not even seek to join the City in May of 1971 when the respondents were presenting their own desegregation plan calling for the racial balance of the Chattanooga Public School System, a plan which would have required massive bussing. The fiscal dependency of the Board of Education upon the City of Chattanooga was again made known during the hearing and the Board's fiscal position and its lack of buses were the bases of the District Court's approval of the partial implementation in September of 1971.

Upon this factual situation the District Court reluctantly ordered that the mayor, the other commissioners, and the city auditor be made party-defendants in this case along with the State court plaintiffs and their counsel. In addition to holding the State court order unconstitutional, the District Court ordered that the desegregation plan previously submitted by the defendant Board of Education, and partially implemented in the Fall of 1971, be fully implemented no later than the Fall of 1972. The respondent N.A.A.C.P. had requested the District Court in their petition to order the full implementation of the plan and to require the City of Chattanooga to pay the costs of purchasing, maintaining and operating the school bus system necessary to carry out the plan. The only logical conclusion which could be drawn from the District Court's action was that the Board of Commissioners of the City of Chattanooga had been ordered by the District Court to pay for such expense, since the Board of Education does not have the power to raise funds or to spend funds other than as allocated to it.

This being the case, the City Attorney, on behalf of the Board of Commissioners, filed a motion for a new trial or rehearing seeking clarification of this point. The thrust of the motion and accompanying brief was that the Board of Commissioners could not be held liable for such expense, approximately $500,000 for the initial capital outlay, since the Commissioners were not party-defendants when the desegregation order was entered and did not have an opportunity to be heard with regard to the necessity of or the design of the new desegregation plan. Nonetheless, the District Court denied the motion by merely stating that the case was on appeal to the Court of Appeals for the Sixth Circuit and that relief could be had there. The City of Chattanooga then filed its appeal, briefed and argued the issue, but such issue was not discussed by the April 30, 1973, opinion of the Court of Appeals. The logical effect of the District Court's order denying the motion and the silence of the Court of Appeals leaves the petitioners without guidance and facing possible contempt charges.

Justice Jackson, in his dissenting opinion in *Federal Trade Commission* v. *Rubberoid Company*, 343 U.S. 470, 494 (1952), spoke to the dilemma facing petitioners:

> To leave definition of the duties created by an order to a contempt proceeding is for the courts to end where they should begin. * * * But in this case issues that seem far from frivolous as to what is forbidden are reserved for determination when punishment for disobedience is sought.

The holding of the District Court that the City of Chattanooga is fiscally responsible for the new transportation system in this factual situation is contrary to *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 110 (1969), wherein the Court stated that:

> It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.

Zenith involved a parent and wholly-owned subsidiary corporation. The factual circumstances there are not as strong as the facts here, because the petitioners cannot and have not controlled the course of this litigation by the independent Board of Education, which has had its own counsel since the inception of this suit.

Petitioners requested the District Court to give them an opportunity to be heard on the issues relevant to them, that is, whether or not the new desegregation plan was required under the holdings of this Court and the Court of Appeals and, if so, what legislative discretion they retained with regard to funding such plan. Petitioners have been denied their due process rights by being bound by a judgment in a case in which they have had no opportunity to be heard. This Court has repeatedly held that "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane* v. *Central Hanover B. T. Co.*, 339 U.S. 306, 314 (1950), citing *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Moreover, this Court further held in *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) that the opportunity to be heard

> "* * * must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place."

Petitioners contend that they have neither been made party-defendants at the appropriate time nor given the opportunity to be heard so as to be bound by the judgment of the District Court. The District Court's actions with regard to petitioners have violated elementary principles of law and petitioner's rights under the Due Process Clause of the United States Constitution.

2. This case presents significant questions which this Court should resolve.

It is quite clear that school desegregation cases are reaching the metropolitan areas in both the South and North. There are a number of cases pending in the courts that involve metropolitan integration but such is still referred to as desegregation. Many metropolitan areas have more than one local school board or government involved. Many cases are similar to Chattanooga in that the local school board has neither the ability to raise nor spend money of its volition. With the adoption of such plans, others beside the local school board are and will be required to provide financial support, especially in cities similar to Chattanooga, where the system was based on a neighborhood school system and bussing was only used in suburban areas recently annexed, where the nearest schools are more distant than are the schools within the older city.

Petitioners contend that city governments and other governmental institutions should be made party-defendants to desegregation proceedings brought for relief that could ultimately require funding by such governmental bodies. To provide complete relief within the meaning of Rule 19 of the Federal Rules of Civil Procedure, the fiscally responsible governments must be made parties. Due Process requires an opportunity to be heard on the necessity for a desegregation plan, and the fiscally responsible

agency must have an opportunity to present its view on any desegregation plan which it must finance.

Similar situations have occurred in the Sixth Circuit at least twice. The same attorney for the respondents herein also represents a class of Negroes in Knoxville, Tennessee. During the middle of a desegregation hearing in Knoxville, the plaintiffs there sought to add the Knoxville mayor and city council as party-defendants. The District Judge there granted such motion but also granted a 45-day continuance in order to allow the new defendants an opportunity to be prepared for trial. *Goss* v. *Board of Education of City of Knoxville*, 340 F. Supp. 711, 712-13 (E.D. Tenn. 1972). Such right was never granted to petitioners here, perhaps due to the untimely request of the respondents to add the City of Chattanooga as a party defendant.

Furthermore, with regard to the metropolitan desegregation of Detroit, Michigan, the District Judge in Detroit had ordered a metropolitan desegregation plan without giving the outlying school districts an opportunity to be heard as such plan affected them. On appeal the Court of Appeals for the Sixth Circuit affirmed in part but remanded the case to the District Court in order to give such other local school districts, which had never been made a party to the desegregation case prior to the formulation of the plan, an opportunity to be heard with respect to a plan to be devised for the desegregation of the Detroit area. *Bradley* v. *Milliken*, — F.2d —, (6th Cir. 1973).

The Court of Appeals, *en banc*, relying upon Rule 19 of the Federal Rules of Civil Procedure, stated:

> We hold that school districts which are to be affected by the decree of the District Court are "necessary parties" under Rule 19. As a prerequisite to the implementation of a plan in this case affecting any school district, the affected district first must be made a party

> to this litigation and afforded an opportunity to be heard.
>
> * * *
>
> On remand, any party against whom relief is sought, including school districts which heretofore have intervened and school districts which hereafter may become parties to this litigation, shall be afforded an opportunity to offer additional evidence, and to cross-examine available witnesses who previously have testified, on any issue raised by the pleadings, including amendments thereto, as may be revelant and admissible to such issues. The District Court may consider any evidence now on file and such additional competent evidence as may be introduced by any party.

Bradley v. *Milliken*, *supra*, pp. 68-69 of the Slip Opinion.

The District Court's opinion, now affirmed *in toto* by the Court of Appeals, *en banc*, is contrary to the holding of this Court in *City of Kenosha* v. *Bruno*, 37 L.Ed. (2d) 109, 41 L.W. 4819 (June 11, 1973), which held that a civil rights action could not be maintained for either equitable or *monetary* relief against a municipality.

In *Goss* v. *Board of Education of City of Knoxville*, the Sixth Circuit Court of Appeals, *en banc*, (Nos. 72-1766, 1767) decided July 18, 1973, affirmed a District Court opinion that *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. (2d) 554, does not mandate forced bussing to accomplish a pre-determined racial mix.

There is no different rule for North and South. Cf. 20 U.S.C. § 1655, and this Court should vacate that portion of the District Court's opinion with respect to the City of Chattanooga's being financially responsible for such full implementation of the plan so that the Board of Commissioners may have an opportunity to be heard with

regard to the necessity of and the details of a desegregation plan for which the City would be financially liable.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted.

EUGENE N. COLLINS
City Attorney
400 Pioneer Bank Building
Chattanooga, Tennessee 37402

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Civil Action No. 3564

JAMES JONATHAN MAPP, ET AL.,
Plaintiff-Appellee,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, HAMILTON COUNTY, TENNESSEE, ET AL.,
Defendants-Appellants.

OPINION

(Filed February 4, 1972)

Upon July 26, 1971, this Court entered its opinion upon all matters then before the Court in this case. See *Mapp* v. *Board of Education of the City of Chattanooga, Tennessee,* 329 F.Supp. 1374. The order entered upon that opinion is now pending upon appeal. At the time that order was entered the following matters were reserved for further consideration by this Court: (1) matters relating to the schedule for full implementation of that portion of the School Board plan relating to student assignments in elementary and junior high schools; (2) tentative approval only was given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School, which was found to be a unitary school and to which final approval was given. There accordingly remain to consider matters relating to

final approval of the plan for desegregation of the four general purpose high schools; and (3) matters relating to the plaintiffs' claim for recovery of attorney fees from the defendant School Board.

Reports, affidavits, and briefs have now been filed regarding the matters remaining for decision as summarized above. Upon December 14, 1971, the plaintiff filed a motion for further relief which substantially reasserts the foregoing matters (See Court File #114).

In addition, a further issue was injected into the case by recent motions filed by each party seeking to enjoin a state court judgment alleged to impede or interfere with the desegregation plans heretofore approved in this case (See Court File #120 and #122). Thereupon an order was entered directing the joinder of additional parties as parties defendant to this case and ordering that the said additional parties should appear and show cause why they should not be enjoined from the enforcement of or compliance with a certain judgment entered in a state court and to which lawsuit they were each parties or counsel for parties.

Taking up first the matters just referred to, that is, the defendant's motion for instructions and the plaintiff's motion seeking to enjoin compliance with or enforcement of an order entered in the state court, reference is made to this Court's instructions and orders entered upon January 25 and 26, 1972 (Court File #121 and #123). Pursuant to these instructions and orders of this Court, there have now been added as additional parties defendant to this lawsuit all parties to that certain state court proceeding entitled "*John E. Grannan, Jr. v. City of Chattanooga, Tennessee, et al.*" #N-15967 in the Circuit Court for Hamilton County, Tennessee, including the plaintiff, John E. Grannan, Jr., each of his counsel of record, and including the City of Chattanooga, its Mayor, each City Commis-

sioner, and the City Auditor. Upon January 28, 1972, a hearing was held wherein the original parties were present or represented by counsel and wherein each new party defendant was present in person and by counsel except Commissioner Rose, who had sought and obtained permission to be excused but who was represented by counsel. The City of Chattanooga was represented by corporate counsel. One of the attorney of record for the plaintiff Grannan in the state court proceedings, Ray Dodson, having disclaimed at the show cause hearing any interest in the state court judgment or proceedings, was dismissed as a party defendant to this case. The purpose of the hearing was to call upon the newly added parties defendant to show cause why a temporary injunction should not issue enjoining and restraining them from enforcement of or compliance with the order entered in the aforesaid case of *John E. Grannan, Jr.* v. *City of Chatanooga*. Upon the basis of the pleadings and the record made upon that hearing, the following matters appear undisputed.

Upon December 9, 1971, a lawsuit was filed in the Circuit Court for Hamilton County, Tennessee, in the aforesaid case of *John E. Grannan, Jr.* v. *City of Chattanooga, et al.* Upon January 18, 1972, a final judgment was entered in that case purporting to permanently enjoin the City of Chattanooga and its officials from using public funds "for the purpose of transporting pupils in order to achieve a racial balance within the Chattanooga Public School System." According to that final judgment a trial was held in the state court upon January 14, 1972, just 35 days after the filing of the original lawsuit. Reference is made to "Exhibit B" to the plaintiff's petition for a full and true copy of the state court final judgment. The legal basis for the state court judgment, as cited on the face thereof, is (1) Section 49-2201 of the Tennessee Code Annotated; (2) Section 1232 (a) of Title 20 of the United

States Code, and (3) "sanity, reason, and the health and well being of the children."

At the time of the show cause hearing in this court the only counsel to speak in support of the validity of the state court order was counsel for the plaintiff therein. Counsel for the City of Chattanooga and for other city officials who were parties defendant in the state court proceedings, stated that he was of the opinion both prior to and after the entry of the state court order that the order was a wholly void and unconstitutional order. Although specifically invited by this Court to do so, no other party or legal counsel present at the hearing, including the Mayor of the City of Chattanooga who is himself an attorney, spoke in support of the validity of the state court order. It was further represented at the show cause hearing, however, that within a matter of days after entry of the state court judgment a public announcement was authorized and made on behalf of the City of Chattanooga and the other defendants in the state court proceedings that no appeal would be taken from the state court judgment and that the said defendants expected to fully comply therewith.

Upon the basis of the foregoing undisputed record, it is perfectly clear that the aforesaid state court judgment seeks to interfere with or impede the orders entered in this case and that the state court judgment is unconstitutional upon its face in that it is in direct conflict with the unanimous decisions of the United States Supreme Court written by Chief Justice Burger in the cases of *Swann* v. *Charlotte-Mecklinburg Board of Education*, — U.S. —, 28 L.Ed. 2d 554, 91 S.Ct. —; *McDaniel* v. *Barresi*, — U.S. —, 28 L.Ed.2d 582, 91 S.Ct. —; and *North Carolina Board of Education* v. *Swann*, — U.S. —, 28 L.Ed.2d 586, 91 S.Ct. —, all of which were entered upon April 20, 1971. It should be noted in passing that these decisions

were entered more than six months prior to the filing of the lawsuit in the state court.

Although these decisions are sometimes referred to by persons not knowledgeable in the law as "mere precedents," all persons with either knowledge of or respect for the law are fully aware that these unanimous decisions of the United States Supreme Court are the *law* of the land, binding upon every person in the land, and every court in the land, including the state courts of Hamilton County, Tennessee and this Court. These matters are so clear as to render any contention to the contrary frivolous upon its face.

In the decision of the United States Supreme Court entered in the case of *North Carolina Board of Education* v. *Swann, supra,* the Court unanimously held that a state statute having the identical purpose as the Tennessee statute recided as the basis for the court order in *Grannan* v. *City of Chattanooga* was unconstitutional, saying:

> "However, if a state imposed limitation on a school authority's discretion operates to impede or obstruct the operation of a unitary school system or impede the disestablishment of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

No only does Section 1232(a) of Title 20, United States Code, cited in the state court judgment show on its face that it has no application to state and local officials in school desegregation cases, but the United States Supreme Court in a unanimous opinion written by Chief Justice Burger in the case of *McDaniel* v. *Barresi, supra,* clearly so state in regard to an almost identical statute in the Civil Rights Act of 1964, saying:

> "Nor is the Board's plan barred by Title IV of the Civil Rights Act of 1964. The sections relied upon by the respondents [42 N.S.C. §§ 2000c (b), 2000c (6)] are directed only at federal officials and are designed simply to foreclose any interpretation of the Act as expanding the powers of federal officials to enforce the Equal Protection Clause. *Swann*, —— U.S. at ——, 28 L.Ed.2d at 567, 91 S.Ct. ——. Title IV clearly does not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems."

Finally, the contention that the use of public funds for student transportation is contrary to "sanity, reason, and health and well being of the children" is directly contrary to the decision of the United States Supreme Court in the case of *Swann* v. *Charlotte-Mecklinburg Board of Education, supra,* wherein the Court stated:

> "Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room school house to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools buy bus in 1969-1970 in all parts of the Country."

The City of Chattanooga has for years financed transportation of students, long prior to this desegregation lawsuit. Likewise, Hamilton County, Tennessee schools have furnished transportation for children and is now doing so. It is obvious that the only transportation of students objected to in the state court order is that transportation which may further the removal of racial discrimination in the schools. When dual school systems were being operated, no contention was then made that transportation

used to keep the races apart was contrary to "sanity, reason and health and well being of children." Counsel for the defendant Grannan himself, the only counsel to make any contention in support of the state court order, admitted that transportation of students to further municipal annexation is lawful and proper. To seek to argue that transportation of students in furtherance of a municipal annexation ordinance is lawful and valid but transportation of the same students in furtherance of the Equal Protection Clause of the United States Constitution is unlawful needs only to be stated to demonstrate its irrationality.

An order must accordingly enter enjoining all parties from either seeking to enforce or in any manner complying with the judgment entered in the case of *John E. Grannan, Jr.* v. *City of Chattanooga, Tennessee, et al.*, #N-15967 in the Circuit Court for Hamilton County, Tennessee, the said judgment being void and unconstitutional on its face.

With regard to the injunction to be entered herein, there remains only to consider the issue of the taxation of costs as to this phase of the lawsuit and whether the legal expenses incurred by any party by reason of these proceedings should be taxed as a part of the costs and, if so, to whom. To advance contentions and to undertake proceedings which parties or their legal counsel know to be directly contrary to specific, clear, and controlling decisions of the United States Supreme Court and which are designed to delay or impede the proceedings or orders of this Court is an act of bad faith upon the part of those parties or their counsel who may so act, and, when established in the record, will be grounds for awarding all costs in such proceedings against parties or their attorneys so found to have acted in bad faith, such costs to include

the legal expenses incurred on behalf of all parties not found to have acted in bad faith. The case will remain before this Court only for resolution of any issues regarding costs. All other matters in regard to this phase of the lawsuit, if any, must be taken up in the United States Court of Appeals where the case is now pending on appeal.

Turning to the matters heretofore reserved following entry of the Court's opinion upon July 26, 1971, and as summarized at the beginning of this memorandum, it appears that full implementation of the student assignment plans heretofore approved has not been accomplished as yet in certain elementary and junior high schools. It further appears that the delay in this regard has been occasioned by the unavailability of funds "in the prompt and orderly process of local governmental affairs," as directed by the Court, the delay in this regard having been occasioned in very substantial part by the uncertainties regarding various programs of federal aid to education. Accordingly, the provisions for full implementation of the plan for student desegregation as contained in paragraph 4 of the order entered upon August 5, 1971, will continue in effect with the further provision that full implementation will be accomplished not later than the fall term of school in 1972, subject, of course, to the rights of the parties to present in the appeal now pending any matters in regard thereto.

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given), further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to

whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" *Swann* v. *Charlotte-Mecklinburg Board of Education*, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.

Turning finally to the motion for the allowance of attorney fees for all legal services performed on behalf of the plaintiffs since the filing of this lawsuit, the Court is of the opinion that the motion should be denied. In the absence of a showing of bad faith on the part of the defendants, the Court is of the opinion that the allowance of attorney fees would not be proper. This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green* v. *School Board of New Kent County*, 391 U.S. 430, 20 L.Ed.2d 716, 88 S. Ct. 1689 (1968), this Court was itself of the opinion that genuine

freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court. Accordingly, it has never been necessary for this Court to direct that ouside persons or agencies, such as the United States Department of Justice or the United States Department of Health, Education, and Welfare, enter into the lawsuit in aid of the development of a lawful plan of desegregation or in aid of enforcement. As recently as in its opinion entered upon July 26, 1971, the Court had this to say:

> "The wisdom and appropriateness of this procedure (i.e., looking to the School Board for the development of a desegregation plan) is further enhanced in this case by the apparent good faith efforts of the Chattanooga school authorities and the School Board to come forward with a plan that accords with the instructions of the Court and its order of May 19, 1971, and with the appellate guidelines therein cited."

Under these circumstances the Court is of the opinion that an award should not be made taxing the defendant Board of Education with the plaintiff's attorney fees.

In conclusion, it appears appropriate for the Court to once again state in simple and basic terms the things it has and has not done in this case.

Acting pursuant to the Equal Protection Clause of the United States Constitution and the unanimous decision of the United States Supreme Court in the case of *Swann* v. *Charlotte-Mecklinburg Board of Education,* this Court

has ordered the removal of all vestiges of racial discrimination in the Chattanooga City Schools where such discrimination was shown to have been created by past or present actions of the state or local government. Nothing more nor nothing less than this has been ordered. Where school zone lines were shown to have been deliberately drawn upon racial lines, either as a carryover from the days when a dual system of schools was operated for white and black children, or otherwise, the redrawing of school zone lines was ordered. In some instances this was done on the basis of pairing or grouping schools. Where transportation of students was shown to be necessary in getting children to the school to which they were zoned, such transportation was approved. No child has ever been ordered by this Court to use school provided transportation. Each child has been ordered to attend the school to which he or she is zoned, a requirement that has been followed since the beginning of public education in this City and in this Nation. When persons attempted to interfere with or prevent the removal of racial discrimination in the Chattanooga Public Schools by means of an illegal and unconstitutional state court order, enforcement of that order was enjoined.

An order will enter in accordance with this opinion.

/s/ FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Civil Action No. 3564

Plaintiff-Appellee,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, HAMILTON COUNTY, TENNESSEE, ET AL.,

Defendants-Appellants.

ORDER

(Filed February 4, 1972)

This is an action for removal of racial discrimination in the public schools of Chattanooga, Tennessee. The case is presently before the Court upon matters reserved for further consideration in the order entered herein upon August 5, 1971, upon the plaintiff's motion for further relief, and upon a hearing held pursuant to an order entered January 26, 1972, joining additional parties to this lawsuit and requiring that they show cause why they should not be enjoined from seeking enforcement of or making compliance with a state court judgment as seeking to impede or interfere with the previous order of this Court requiring the removal of racial discrimination in the Chattanooga Public Schools. This order is entered in accordance with the opinion of the Court filed this date.

It is accordingly ORDERED:

(1) That Ray Dodson, having disclaimed any interest in this lawsuit, is hereby dismissed as a party defendant;

(2) That each of the other parties defendant joined herein by order of this Court entered January 26, 1972, including John E. Grannan, Jr., Glenn T. McColpin, Floyd E. Morgan, the City of Chattanooga, Tennessee, Robert Kirk Walker, Mayor of the City of Chattanooga, Steve Conrad, Gene Roberts, John Franklin, and Pat Rose, Commissioners of the City of Chattanooga, and William Zachary, City Auditor of the City of Chattanooga, and any other person or party acting for or on their behalf, be and hereby are enjoined from in any manner seeking enforcement of or in any manner complying with the judgment and order of the state court entered in the case of *John E. Grannan, Jr.* v. *The City of Chattanooga, Tennessee, et al.*, No. N-15967 in the Circuit Court for Hamilton County, Tennessee, the said order being void and unconstitutional on its face;

(3) That paragraph (4) of the order entered in this cause upon August 5, 1971, will be modified to the extent of adding thereto that full implementation of the defendant School Board's plan for student assignments in the elementary and junior high schools will be accomplished not later than the fall term of school 1972 unless otherwise stayed in the United States Court of Appeals;

(4) That on or before June 15, 1972, the defendant Board of Education will either submit a report in which they demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of present or past discriminatory action on the part of the State of Tennessee or the Board of Education, or otherwise, to the extent that the Board of Education is not able to so demonstrate, submit a further plan for removal of all such remaining racial discrimination;

(5) That the plaintiff's motion for the allowance of attorney fees for services performed by plaintiff's counsel since the inception of this lawsuit be denied; and

(6) That there be reserved for further proceedings and action of the Court only the matter of determining any issues with regard to taxation of costs, including attorney fees, in that phase of the lawsuit relating to the enjoining of a state court order as referred to in paragraph (2) of this order.

This will be a final order in this cause and subject to appeal as such.

APPROVED FOR ENTRY.

/s/ FRANK W. WILSON
United States District Judge

Nos. 71-2006, 71-2007, 72-1443 & 72-1444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, ET AL.,
Plaintiffs-Appellants and Cross-Appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, ETC., ET AL.,
Defendant-Appellee and Cross-Appellant.

APPEAL from United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed October 11, 1972

Before WEICK and EDWARDS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. In their appeal in the main case the plaintiffs contend that the District Court erred in approving an interim high school plan which left the majority of black students in segregated schools; in approving a plan which left Junior High Schools and Elementary Schools racially identificable; in approving continued racial identifiability of schools on constitutionally impermissible grounds; and in imposing a disproportionate burden on black students by ordering the closing of black schools and not white schools. The plaintiffs pray, therefore, that the

case be remanded with instructions to enter detailed findings of fact with respect to these measures, and in the absence of compelling justification that the plan be disapproved. They also ask us for a declaratory judgment.

The defendants contend that they were not in default, and that over the years they have always complied with all orders entered by the District Court, except the order from which both parties are now appealing. They contend that the order was unjustified since they had not been in default; that the order goes too far in requiring pairing and clustering of schools, and in requiring the expenditure of large sums of money to purchase buses to provide transportation to achieve a quota or racial balance in each and every school in the school system.

The Board of Commissioners of Chattanooga has appealed, contending that its due process rights have been violated by the order of the Court; that the Board of Commissioners is not bound by orders of the Court made prior to the time it was made a party to the litigation; and that it (Board of Commissioners) alone, and not the Board of Education, has the power and authority under Tennessee law to appropriate funds and levy taxes.

It is obvious to us that none of the parties is satisfied with the desegregation order of the District Court and that the main appeal is only a piecemeal appeal. For the reasons hereinafter set forth, and in compliance with the request of the plaintiffs we remand for further consideration and direct the District Court to present a plan which will finally determine this apparently-indeterminable litigation, which is now more than twelve years old. We do not grant to plaintiffs declaratory relief which they request, as this is beyond our jurisdiction as an Appellate Court. Plaintiffs' request for declaratory relief should be presented to the District Court.

I

HISTORY OF THE CASE

These appeals graphically illustrate developments in the law relating to school desegregation since *Brown I* and *Brown II* which, even after *Swann*, and related cases, have perplexed and confused judges, lawyers and legal scholars.[1]

In the present case the School Board has been subject at all times to the continuing jurisdiction and supervision of the District Court since 1960, and the District Judge since he took over the case has handled promptly all matters submitted to him.

The Board has co-operated in all respects with the District Court and has complied with all of its orders except those orders from which both parties have appealed and which involve the expenditure of large sums of public funds for busing.

In 1962 the Court approved a plan for the gradual desegregation of the Chattanooga public schools, which plan undertook to desegregate all of the elementary schools by 1965, and the Junior High Schools in 1966, all high schools in 1968, and Chattanooga Technical Institute in 1969. The Court found that the plan was "a prompt and reasonable start toward desegregation and as accomplishing full desegregation with all deliberate speed." Upon appeal, the judgment of the District Court was affirmed except as to technical and vocational courses, and the case was remanded for further proceedings with respect to them. *Mapp* v. *Board of Educ.*, 319 F.2d 571 (6th Cir. 1963).

On March 29, 1965 the plaintiffs moved for further relief seeking an acceleration of the plan for desegregation which

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[1] The Supreme Court, 1970 Term, 85 Harvard Law Review p. 74 (1971); School Desegregation After Swann, A Theory of Governmental Responsibility, Univ. of Chicago Law Review No. 2, Winter 1972.

the Court granted, requiring all grades to be desegregated by September, 1966. On appeal we affirmed, except as to faculty assignments. *Mapp* v. *Board of Educ.*, 373 F.2d 75 (6th Cir. 1967).

On March 29, 1967, the case was restored to the docket for further consideration of the issue of faculty assignments.[2] Nothing then occurred until twenty-one months later when plaintiffs filed another motion for further relief.[3] About eleven months later plaintiffs filed a motion for immediate relief.

The Board answered the motions, stating that no decisions based on race had been made by it since the beginning of the academic year 1966-67, and further, since that time "no person has been excluded from any school because of race or color", and that the Chattanooga School System is a unitary system within the meaning of *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).[4]

In an opinion dated February 19, 1970, the Court discussed the Supreme Court decisions and decisions of this Court intervening between the date of its approval of the plans for desegregation, and the present time, and in view of disputed factual issues it ordered an evidentiary hearing.

On May 19, 1971, the Court rendered an oral opinion from the bench, in which it found that the school system was not unitary and suggested that the Board read some of the more recent decisions of the Supreme Court and of this Court, and ordered it to file another plan for desegregation.

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[2] Faculty assignments are no longer an issue.

[3] The motions for further relief were usually filed after rendition of new opinions by the Supreme Court.

[4] The Board was of the view that prior to *Swann*, it had no right to assign children on the basis of race.

In response thereto the Board filed such a plan containing provisions which it deemed necessary in order to comply with the order of the Court. The Court approved the plan with certain modifications, and both parties have appealed. *Mapp* v. *Board of Educ.*, 329 F.Supp. 1374 (1971). The plan as approved by the Court will require an initial capital outlay and operational expenditure of $468,126. 329 F. Supp. at 1386.

The history was detailed here in order to dispel any inference or claim that only the Board is responsible for all the delay in this case. The District Court did not blame the Board. It was of the view that the plans which it had previously approved would eliminate all vestiges of racial discrimination. It was only upon consideration of recent Supreme Court cases and decisions of this Court that the District Court concluded this had not been accomplished. The Court said:

> "In the intervening ears very substantial progress has been made. Following appellate guidelines as they then existed, this Court believed upon each previous occasion it entered desegregation orders, first in 1962, then in 1965 and 1967, that all vestiges of the dual system of schools would be removed upon fulfillment of its orders and only a unitary system remain. Experience and appellate redefinition of the concept of a unitary school system have now mandated that further steps be taken to accomplish the full and final desegregation of the Chattanooga schools. As reflected by the undisputed evidence, a number of the Chattanooga schools remain racially identifiable." (329 Fed. Supp. at 1380).

In the areas of state action, in what manner and to what extent a dual system must be dismantled so as to become a unitary system, still is unclear. See footnote 1.

In our opinion, the fact that the Board obeyed the order

of the Court and filed a plan which it believed the Court required, and which the Court did adopt with modifications, did not estop it from appealing from the judgment approving such plan.

On more than one occasion the Court has commented on the good faith of the Board.

In denying an application of counsel for plaintiff for attorney's fees, the Court said:

> "Turning finally to the motion for the allowance of attorney fees for all legal services performed on behalf of the plaintiffs since the filing of this lawsuit, the Court is of the opinion that the motion should be denied. In the absence of a showing of bad faith on the part of defendants, the Court is of the opinion that the allowance of attorney fees would not be proper. This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green* v. *School Board of New Kent County*, 391 U.S. 430, 20 L.Ed. 2d 716, 88 S.Ct. 1689 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all time complied or attempted to comply in good faith with the orders and directions of the Court."

II

FIXED RACIAL BALANCE AND QUOTAS IN EACH SCHOOL

Plaintiffs' plan, which they contend the Court erred in not adopting, was prepared by its expert witness, Dr. Michael Stollee. This plan, as stated in plaintiffs' brief, provides:

> "His [Dr. Stollee's] plan proprosed the desegregation of elementary schools by use of pairing, grouping and clustering (Tr. 1583) resulting in distribution of no less than 30 or no more than 70 percent racial concentration of blacks or whites in every elementary school. His plan for junior high projected desegregation by redirecting the elementary feeder system, using the new groupings provided in his elementary plan (Tr. 1594). The distribution again was projected within the 70-30 range (Tr. 1890). He proposed rezoning the four general purpose high schools to achieve a racial distribution between 49.1% to 51.9% black (Tr. 1601). Transportation would be required for some, though not all students under each phase of the plan (Tr. 1645). His plan provided for the transfers of faculty to remove racial identifiability (Tr. 1609) and affirmative language for protection of teachers in the desegregation process (Tr. 1614). Construction policy in his plan provided that this school board would have an affirmative duty to place schools to further integration (Tr. 1620)."

This plan is "based upon an allowable 20% variation on either side of the total racial population with the result that all schools would have at least 30% of each race and not more than 70% of the other race. (Tr. 1585)." Appellees' brief, page 48.

The plan which the Court approved achieves "a racial ratio of not less than 30% nor more than 70% of any race

in each elementary school within the system with but five exceptions . . ." 329 F.Supp. 1374, 1382. As to the five exceptions, the Court found that the imbalance was not the result of past or present discrimination. A similar racial balance was provided for the Junior High Schools. Senior High Schools are still under consideration.

It is thus apparent that the plaintiffs' plan requires a fixed racial quota or balance in each and every school in the system, while the plan adopted by the Court requires such ratio in all but five schools. Both plans certainly do provide for "maximized integration."

We do not read *Swann* and related cases as requiring a *fixed* racial balance or quota in each and every school in a city, irrespective of the residential patterns of the city. Yet that is exactly what both of these plans provide.

If there was any doubt about *Swann* not requiring such quotas, the doubt was dispelled in Chief Justice Burger's opinion in *Winston-Salem Forsyth County Bd. of Educ.* v. *Scott*, 404 U.S. 1221 (1971), ruling on an application for a stay.

The District Court was obviously impressed by the fact that in *Swann* the Supreme Court affirmed a judgment requiring massive busing to an extent much greater than that in the present case. We do not have before us the record in that case for purpose of making comparison, but we are certain that *Swann* involved a situation entirely different than the case at bar, because of the failure of the Board of Education in *Swann* to co-operate with the District Court, and it was clearly in default. We do not believe that the Supreme Court in *Swann* was telling District Courts to adopt massive busing orders such as was involved there.

In reality, in cases involving massive busing the school children of both races are being used in an effort to integrate the races in the entire school system. This is a far cry from

Brown I and *Brown II,* and involves impingement on the constitutional rights of the children who do not wish to be so used.

We do not consider that *Swann* issued a general command that all United States District Judges imitate and enforce the colorful and dramatic orders of Judge McMillan. It merely permitted what he had ordered.

In *Goss* v. *Board of Education,* 444 F.2d 632, 636 (6th Cir. 1971) we observed:

> "The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. . . . We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere."

In the case at bar the District Judge held, as set out hereinabove, that the School Board has at all times acted in good faith and has at all times "complied or attempted to comply with the orders and directions of the Court."

We do not believe that the Boards of Education can be faulted for the residential patterns of a city, or for the heavy concentration of black or white population in certain areas, or for the mobility of both races. These are matters over which the school system has no control, neither does it have authority to assume such control. It has always been the practice in the American educational system, until recently, to locate schools near residences, and these schools have been known as neighborhood schools. Neighborhood schools enabled parents of children to participate in the school's operation, enabled the children to engage

in other activities and to associate with their friends and neighbors, and even to walk to and from school. Destruction of the neighborhood school system deprives both parents and their children of these advantages, and can even lower the quality of education. "School Desegregation After Swann," Univ. of Chicago Law Review, Vol. 39 No. 2, Winter 1972, at 444.

III

BURDEN OF PROOF

Ordinarily where a dual system has been maintained, the burden of proof rests upon the School Board to establish that present racial imbalances in a particular school are not the result of past discriminatory actions of either the Board or even the state, although the cases are not very clear as to just how or in what manner the Board can ever meet such a heavy burden. But in a case like ours, where the Board has complied with the desegregation orders of the Court, and the plaintiffs have filed motions for further relief, it would seem to us to be only fair that plaintiffs should have the burden to prove that they are entitled to such further relief. The Board ought not to have the burden of disproving every contention which the plaintiffs may see fit to make in this case. In our judgment the Court erred in placing on the defendants the burden of proof in resisting plaintiffs' motion for further relief.

IV

MAXIMIZING INTEGRATION

The District Court further required the Board to establish that it had taken affirmative action to "maximize integration" in all feasible ways as required by *Kelly* and

Robinson. The Supreme Court in *Davis* held that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation." We have not found where the Supreme Court has used the words "maximize integration". If maximize desegregation and maximize integration mean one and the same thing, then the use of these words would be proper. The difficulty is that the District Court may well have understood the words to require integration of the races by fixed numbers or quotas in each public school in the system, regardless of where the pupils live, and regardless of their economic circumstances. We do not believe the law requires any such thing.

It should be pointed out that there is a marked distinction between voluntary busing and induced or forced busing in the effect on the children involved and their parents. No one can have any objection to the school system furnishing transportation from the child's residence to the school nearest thereto. It is something entirely different when the child by reason of a Court order is assigned away from his neighborhood school and is required to be transported to another school (whether by his parents' car or by induced busing) some distance away from his home.

Brown I speaks of the feeling-of-inferiority effect on children as the result of discriminatory state action where the children are not permitted to attend certain public schools because of the color of their skin. This condition would seem to persist still if children of both races are prohibited from attending schools nearest to their residences, merely because of the color of their skin, and are required to be taken eleswhere to school.

V

PRACTICALITIES

In considering desegregation plans the District Court must take into account the practicalities of the proposals. These include the cost thereof, how such proposals may affect the rights of the children involved in the assignments, induced busing, and the educational achievement of such proposals.

Boards of Education do not have unlimited funds to adopt any program which they please. Funds can be raised by taxation and appropriation. In the present case the Board of Education does not have the power to levy taxes or to appropriate funds to carry out its programs. Only the Board of Commissioners of the city has such power and authority. That Board was not made a party to the case in the District Court until after the desegregation orders had been entered by the Court. We would assume that the Board of Commissioners has already appropriated the funds for the 1972-73 school year. If so, we do not know how an expenditure of $500,000 for buses would affect operation of the schools. The District Court has not ordered the Board of Commissioners to appropriate funds to provide for the transportation of pupils, and we do not consider in this appeal the question whether it has the power to enter any such order.

In our judgment the mere fact that the District Court at one time considered the Board of Education in compliance, did not preclude the Court from holding otherwise when considering the case in the light of more recent decisions.

Upon remand, the Court no doubt will want to consider the recent article by David J. Armor on "The Evidence On Busing," in *The Public Interest,* No. 28, Summer 1972,

page 90, which article contains some evaluations of the effects of busing on black pupils. In *Brown I* the Supreme Court considered articles by sociologists, and we would see no objection to the District Court doing likewise.

In our judgment a quota system can invidiously discriminate in favor of one race against other races. Such a system can lower the quality of education and educational achievement and polarize the races.

VI

THE DISSENT

We do not understand the purpose of attaching as Appendix "A" Tennessee Statutes which are no longer in force because the Supreme Court of Tennessee held the same unconstitutional in 1956. *Roy* v. *Brittain*, 201 Tenn. 140, 257 S.W.2d 72. Nor do we understand the purpose of the attachment of "A Brief Critique of Dr. Armor's 'The Evidence on Busing.' "

The complete history of the de jure system in the Tennessee public schools is well known and has been portrayed fully in previous decisions of this Court, which decisions are cited in the dissent.

Dr. Armor's article, as well as the critique, had best be considered in the first instance upon the remand which we ordered.

The decisions of individual Justices of the Supreme Court on applications for a stay under the provisions of § 803 of the Education Amendments of 1972, Pub.L. 92-318, § 803 (June 23, 1972) are not relevant here in view of our remand of these appeals to the District Court for further consideration.

The Education Amendments are relevant, however, for consideration by the District Court on the issue of practi-

cality because of provisions therein which operate to deprive the Board of Education of federal funds to carry out the busing order of the District Court.

While wide and almost unprecedented authority and discretion have been conferred on District Courts in their consideration of school desegregation cases, by the very nature of things such authority is not unlimited.

There seems to have grown up across the land an idea by most United States District Judges that extensive busing must be ordered to obey the commands of *Brown I* and *II*. They turn to *Swann* for their authority. *Swann* did not decide anything of the kind. In the case before us, as was true in other decisions, this Court had approved the conduct of various Boards of Education who made an honest effort to establish a unitary system. If now every order involving schools requires busing, the question may well be asked, "What next?"

As we pointed out, the District Court previously found compliance by the Board of Education with its desegregation order. It was only upon the rendition of new decisions by either the Supreme Court or this Court, that the District Court determined that such compliance had not achieved a unitary system. Such system cannot be achieved, according to the plaintiffs, until there is a fixed racial quota in each and every school in the system, irrespective of where the children live. Their program seems to be based on a head count, and requires busing, with little or no regard for the wishes of the children or their parents, the cost and feasibility of such programs, the effect on existing educational programs, educational achievement of the children, or their safety, or their constitutional rights.

Remanded for further consideration.

EDWARDS, Circuit Judge, dissenting. Much as I respect my two brothers who constitute the majority of this panel, I would be less than candid if I did not say that I believe their opinion in this case represents a repudiation of settled constitutional law in *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis* v. *Board of Commissioners*, 402 U.S. 33 (1971) and *Brown* v. *Board of Education I*, 347 U.S. 483 (1954); *Brown* v. *Board of Education II*, 349 U.S. 294 (1955), to name only four of the most important and controlling Supreme Court precedents.

It is in my view also completely inconsistent with opinions of this court in which the great majority of the members of this court have joined: *Monroe* v. *Board of Commissioners of City of Jackson*, 427 F.2d 1005 (6th Cir. 1970); *Robinson* v. *Shelby County Board of Education*, 442 F.2d 255 (6th Cir. 1971); *Davis* v. *School District of the City of Pontiac*, 443 F.2d 573 (6th Cir. 1971); *Oliver* v. *School District of the City of Kalamazoo*, 448 F.2d 635 (6th Cir. (1971); *Kelley* v. *Metropolitan County Board of Education*, — F.2d — (6th Cir. 1972) (Decided May 30, 1972); *Northcross* v. *Board of Education of Memphis City Schools*, — F.2d — (6th Cir. 1972) (Decided August —, 1972). Under all of these cases the facts in this case call for our affirmance of the District Judge's opinion and judgments. As I see it he has done nothing more than follow the clear mandate of the Supreme Court and this court in the cases cited above.

If there could be any doubt about the continued validity of the cases cited above, it would have to be due to quite recent changes in composition of the Supreme Court or to the adoption of § 803 of the Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972), by the United States Congress. I fell any such doubt has been completely dispelled by the actions of the Supreme Court this summer.

On the § 803 issue an opinion of Mr. Justice Powell denying application for a stay in the Augusta, Georgia, desegregation case is directly in point:

> This reapplication is premised solely on the contention that a stay is required under § 803 of the Education Amendments of 1972. That section reads in pertinent part as follows:
>
> > "in the case of any order on the part of any United States District Court which requires the transfer or transportation of any student . . . *for the purpose of achieving a balance among students with respect to race* . . ., the effectiveness of such order shall be postponed until all appeals . . . have been exhausted . . . ." Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972) (emphasis added.)
>
> By its terms, the statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the "transfer or transportation" of students "for the purpose of achieving a balance among students with respect to race." It does not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result.
>
> In § 802 (a), which precedes § 803, Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the program is to "overcome racial imbalance" or to "*carry out a plan of desegregation.*" Education Amendments of 1972, Pub. L. 92-318, § 802 (a) (June 23, 1972) (emphasis added). It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance.

In light of this Court's holding in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that § 407 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6, restricted the power of federal courts in prescribing a method for correcting state-imposed segregation. THE CHIEF JUSTICE's interpretation of § 407 (a), which applies only to orders "seeking to achieve a racial balance," is controlling here:

> "The proviso in [§ 407 (a)] is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those power or withdraw from the courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." 402 U. S., at 17-18 (emphasis in original).

* * *

For the purpose of acting on this application, I accept the holdings of the courts below that the order was entered to accomplish desegregation of a school system in accordance with the mandate of *Swann* and not for the purpose of achieving a racial balance. The stay application must, therefore, be denied.

Drummond v. *Acree*, — U.S. — (1972) (Decided September 1, 1972).

Subsequent to Justice Powell's denial of a stay, the same motion was presented to Chief Justice Burger and on Sep-

tember 8, 1972, was denied by him. There is no legal or constitutional difference between the Augusta case (*Acree* v. *County Board of Education of Richmond County, Georgia*, 458 F.2d 486 (1972)) and the one we deal with from Chattanooga.

Similar denials of stays have been entered in relation to similar § 803 applications by Mr. Justice Rehnquist on August 22, 1972, in the case of Oklahoma City. (*See Board of Education of Oklahoma City* v. *Dowell*, 338 F. Supp., 1256 (W.D. Okla. 1972)) and on August 25, 1972, in the case of Nashville, Tennessee (*See Kelley* v. *Metropolitan County Board of Education of Nashville, Tenn.*, 436 F.2d 856 (1970), *on remand*, — F. Supp. — (M.D. Tenn. 1971), — F.2d — (6th Cir. 1972)).

Another such denial of a § 803 stay was entered September 5, 1972, by Mr. Justice Douglas in *Guinn* v. *Kelly, Supt. of Schools of Clark County School District, Nevada*, — U.S. — (1972).

See also Keyes v. *Denver School District*, 396 U.S. 1215 (1969); *Winston-Salem/Forsyth County Board of Education* v. *Scott, et al.*, 404 U.S. 1221 (1971); *Guey Heung Lee* v. *Johnson*, 404 U.S. 1215 (1972); *Jefferson Parish School Board* v. *Dandridge*, 404 U.S. 1219 (1971).

All of these denials of stay are fundamentally based upon the continued vitality of the four unanimous Supreme Court opinions cited in the first paragraph of this dissenting opinion.

In the last opinion in chambers cited above, Mr. Justice Marshall said:

> The devastating often irreparable, injury to those children who experience segregation and isolation was noted 17 years ago in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). This Court has repeatedly made it clear beyond any possible doubt that, absent

> some extraordinary circumstances, delay in achieving desegregation will not be tolerated. See, *e. g., Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969); *Carter* v. *West Feliciana Parish School Board,* 396 U. S. 226 (1969); *Keyes* v. *School District No. 1,* 396 U. S. 1215 (1969) (BRENNAN, J., vacating stay).
>
> *Jefferson Parish School Board* v. *Dandridge, supra* at 1220.

There are no "extraordinary circumstances" in the instant appeal.

This is a classical school desegregation case concerning a city, Chattanooga, which historically has maintained a dual school system segregated by race, and a state, Tennessee, which historically by law has sought to require its school boards to maintain segregated school systems. (See Appendix A.) The District Court order appealed from requires the appellant Board of Education of the City of Chattanooga to proceed with desegregation of its elementary and junior high school systems by the fall term of 1972 and to propose a plan for doing the same in relation to its high school system by June 15, 1972.

Three separate appeals have been perfected from the District Judge's order. In the main cases, 71-2006 and 71-2007, the Board of Education appeals and the plaintiffs appeal from the District Judge's desegregation order addressed to the Chattanooga Board of Education. In No. 72-1443, the Board of Commissioners of Chattanooga (the city council) appeals from the same order referred to above, but on the additional ground that it, by implication, would require an expenditure of city funds on the part of the Board of Commissioners of Chattanooga, which has only recently been made an intervening defendant.

The appeals in these cases are here on the merits, along with a motion for stay of the District Judge's order pending appeal. The positions of the principal appellants are as follows:

Plaintiffs' appeal asserts that the delays in integrating the Chattanooga school system have been endless; that the order of the District Judge now entered will not accomplish the desegregation contemplated by applicable Supreme Court cases; that there is no final order as yet for desegregation of the four high schools which are, according to plaintiffs, still clearly segregated, and that the order entered by the District Judge, by dint of closing several black schools and requiring the black children in the youngest grades to be bused to white schools, invidiously discriminates against them in the remedial measure chosen.

Appellant School Board contends that the District Judge's order misinterprets Chief Justice Burger's opinion for the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), by proposing a plan directed to achieve "a racial balance," and further, improperly requires transportation of school children.

The Board of Commissioners argues that the effect of its being made a party defendant is to make it vulnerable to contempt proceedings if it fails to appropriate the necessary funds to finance the plan contemplated by the District Judge's order. The Board of Commissioners points out that it had not been a party to the principal litigation until very late in the proceedings and had not had (although it requested it) an opportunity to litigate the issues. The Board of Commissioners also puts forward the identical arguments as to the merits of the case advanced by the Board of Education of the City of Chattanooga.

The lengthy history of this litigation is a necessary predicate to discussion and decision of the stated issues.

Procedural History

Apr. 6, 1960 — This complaint was filed.

Nov. 13, 1961 — *Mapp* v. *Board of Education of City of Chattanooga,* 295 F.2d 617 (6th Cir. 1961), affirmed a District Court order directing the Board to file a desegregation plan.

Apr. 20, 1962 — *Mapp* v. *Board of Education of City of Chattanooga,* 203 F. Supp. 943 (E.D. Tenn. 1962). District Court orders Board to desegregate its schools within a period of not more than eight years. Court retained jurisdiction. *Aff'd,* 319 F. 2d 571 (6th Cir. 1962), except for provisions relating to technical and vocational courses.

Nov. 26, 1963 — Order entered desegregating Chattanooga Technical Institute.

Dec. 31, 1963 — Further order desegregating all vocational and technical courses.

Mar. 29, 1965 — Plaintiff moves for further relief, seeking acceleration of the plan for desegregation, including desegregation of faculty and supervisory personnel.

Feb. 27, 1967 — *Mapp* v. *Board of Education of City of Chattanooga,* 373 F.2d 75 (6th Cir. 1967). District Court order accelerating desegregation affirmed, except with regard to faculty assignments for which further proceedings were ordered.

Mar. 29, 1967 — Case restored to the docket for further consideration of the issue of faculty assignments.

Dec. 31, 1968 — Plaintiffs file motion for further relief, seeking temporary injunctive relief, to be followed by permanent injunction.

Nov. 14, 1969 — Plaintiffs file motion for immediate relief.

Feb. 19, 1971 — Evidentiary hearing set for April 1, 1971, on foregoing plaintiffs' motions filed.

Apr.-May 1971— Hearings held on plaintiffs' motions.

May 19, 1971 — Opinion issued from the bench. (1) School system was found to be unconstitutional; (2) Desegregation plans ordered.

July 26, 1971 — Memorandum and findings entered by District Court. (Plan submitted by Board approved concerning provisions for elementary and junior high schools. Tentative approval for portion of Board plan respecting high schools.)

Aug. 5, 1971 — District Court files order directing implementation of Board plan approved July 26, 1971, where reasonably feasible by 1971-72 school year. Time was allowed for delayed implementation where staffing and transportation equipment had to be acquired.

In the very first consideration of this case by this court, Judges Miller, Weick and O'Sullivan noted:

> It was not controverted that the Board has pursued a policy of operating a biracial school system; that the system was established almost a century ago and has been continued by the members of the present Board. Although more than five years have elapsed since the Supreme Court held racial segregation in the public schools to be a violation of constitutional rights no plan for desegregation had been adopted by the Board until ordered by the Court.
>
> The Board contends that after the second Brown decision it publicly announced its policy of compliance with the decision and engaged in extensive educational activities to elucidate said policy to the people of the community in order to bring about public acceptance of desegregation. It claims that these activities constituted the first step in its plan of implementation of said policy. It asserts that it had not adopted any plan for desegregation because the people in the community were not realy for it and would not accept it. *Mapp* v. *Board of Education of City of Chattanooga*, 295 F.2d 617, 618 (6th Cir. 1961). (Footnotes omitted.)

This court upheld the District Judge in rejecting a Board desegregation plan which was held to be "indefinite as to when desegregation would take place in all of the schools" and in requiring the Board to file an alternative plan to accomplish same.

This record clearly shows that the Board of Education's progress in dismantling its dual school system has been minimal from 1962 down to date. It also shows that if the Board of Education's 1971 plan as far as elementary schools and junior high schools is promptly and effectively carried out, a unitary school system as to these units will result.

Judge Wilson's opinion accurately describes what this record contains concerning these comparisons as far as the elementary schools and the junior high schools are concerned:

Elementary Schools

During the school year 1970-71, the Chattanooga School System operated 33 elementary schools. Of the ten former black elementary schools within the system, four remained all black and a total of only 30 white students attended the other six. In the 23 former white elementary schools there were 13,250 white children and 3,446 black children. Four former white elementary schools (Cedar Hill, Normal Park, Pineville, and Rivermont) remained all white. Barger had only two black students and East Lake had only three black students. Two former white elementary schools (Avondale and Glenwood) had changed to all black schools, having only three white students between them. The remainder of the former white elementary schools had ratios of black students varying from a low of 4% to a high of 64%.

The School Board proposes the accomplishment of a unitary system within the elementary schools by the closing of five elementary schools, by the pairing of 16 elementary schools, by the clustering of six elementary schools, by the rezoning of three elementary schools, leaving the attendance zones of only three elementary schools unchanged. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions (Barger—20% black and 80% white; Carpenter—86% black and 14% white; Long—16% black and 84% white; Rivermont—12% black and 88% white; and Sunnyside—15% black and 85% white). *Mapp* v. *Board of Education of City of Chattanooga, Tenn.*, 329 F. Supp. 1374, 1381-82 (E.D. Tenn. 1971).

Junior High Schools

During the school year 1970-71, the Chattanooga School System operated 12 junior high schools. Of the

> four formerly black junior high schools within the system, two remained all black and a total of only 9 white students attended the other two. In the eight formerly white junior high schools, there were 3,341 white students and 908 black students. One formerly white junior high school (East Lake) had only one black student. The remainder of the formerly white junior high schools had ratios of black students varying from a low of 8% to a high of 70%.
>
> The School Board proposes the accomplishment of a untiary system within the junior high schools by closing two junior high schools and by rezoning the remaining ten junior high schools, tying them into the restructed elementary school system. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in all but three junior high schools. Those three schools are Hardy, with 73% black and 27% white, Dalewood, with 29% black and 71% white, and Long, with 15% black and 85% white. *Id.* at 1383.

After noting a satisfactory Board of Education plan which desegregated the Technical High School, the District Judge described the continuing problem of the other four racially segregated high schools:

> While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of

> choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. *Id.* at 1385.

None of the facts which we have quoted from the District Judge's opinion are disputed by the parties and the record amply supports them.

Plaintiffs' Exhibit 3, the accuracy of which is undisputed, shows that as of the close of this record, 9,223 black students were attending previously all black schools, along with 48 white students. Using 90% to indicate a predominantly one-race school, we find the following situation confronting the District Judge and this court:

> Previously all black schools still predominately one race (90% or more black):
>
> | | |
> |---|---|
> | Elementary schools | 10 out of 10 |
> | Junior high schools | 4 out of 4 |
> | Senior high schools | 2 out of 2 |
>
> Previously all white schools still predominantly one race (90% or more white):
>
> | | |
> |---|---|
> | Elementary schools | 12 out of 23 |
> | Junior high schools | 2 out of 8 |
> | Senior high schools | 1 out of 2 |
>
> (These computations exclude the Technical High School.)

From Exhibit 3 we also compute the following comparisons concerning the total school population of Chattanooga's schools:

1962-63

99.6% of black children attended schools in which 100% of the students were black.

100% of white children attended schools in which 99.7% of the students were white.

1970-71

72.8% of black children attended schools in which 99.5% of the students were black.

99.6% of white children attended schools in which 79.5% of the students were white.

This record makes clear that in the sixteen years since *Brown* v. *Board of Education*, 349 U.S. 294 (1954), and in the eleven years of litigation between 1960 and 1971, the results may be summarized as follows:

1) Minimal integration of some previously all white elementary and junior high schools.

2) Complete failure to desegregate the previously all black elementary and junior high schools.

3) Complete failure to desegregate the high schools.

I would test the District Judge's order on this appeal against the Constitutional mandate of "equal protection of the law." The objective sought has been recently thus described by Chief Justice Warren Burger, writing for a unanimous United States Supreme Court:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school

> authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437-438.
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann* v. *Board of Education,* 402 U.S. 1, 15 (1971).

This record demonstrates beyond doubt that the Chattanooga "school authorities [have] fail[ed] in their affirmative obligations" to eliminate racial discrimination "root and branch." It mandates our prompt affirmance of the order of the District Judge adopting the desegregation plan finally proposed by appellant Board of Education of Chattanooga as far as the elementary and junior high schools are concerned.

The appellate issues stated in the principal cases (Nos. 71-2006 and 71-2007) by defendant-appellant Board of Education of City of Chattanooga, although phrased as ten separate issues seems to me to be rephrasing of the issues this court dealt with recently in *Kelley* v. *Metropolitan Board of Education,* — F.2d — (6th Cir. 1972) (Decided May 30, 1972, Nos. 71-1778-79). In *Kelley* this court said:

> **II The Ratio and Residual Effect Issues**
>
> Where a school system has been deliberately constructed on a segregated basis by state action, a duty inheres in the School Board to do more than to establish rules fair on their face which simply serve to perpetuate the effects of such segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 26, 28 (1971).

The record in this case supports the District Judge's findings that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until the close of the record — if not beyond. The record also discloses a background of racial discrimination by means of state law which motivated much of the school segregation. (See Appendix A)

The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system.

Nor, of course, does it alter the duty of the District Court on default of the school board to require production of such a plan and order it into effect. Chief Justice Burger put the matter thus in the *Davis* case:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *School Commissioners of Mobile County, supra* at 37.

Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. *See*

Swann v. *Charlotte-Mecklenburg Board of Education, supra* at 16, 23-24. The District Judge in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error.

An earlier finding of "good faith" does nothing to excuse the defaults and failures shown by this record. "The measure of any desegregation plan is its effectiveness." *Davis* v. *School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971). *See also Green* v. *County School Board,* 391 U.S. 430, 439 (1968). *Kelley* v. *Metropolitan Board of Education, supra* at 21-22 (Slip opinion). (Footnote omitted.)

In the instant case, of course, as distinguished from the *Kelley* case, the flexible ratio chosen as a guide to its plan (no race to be represented by less than 30% or more than 70% of the student body) was one chosen by appellant Board of Education of Chattanooga, and the plan actually adopted by the District Court was one put forward by the appellant also. Since appellant, in spite of proposing the plan, has never put it into effect and is now by this appeal continuing to resist ever having to do so, it can hardly rely upon the plan as curing its default.

As to this aspect of the case, the Board of Education's failure to implement its own plan simply makes more obvious its "default" in the sense that term is used in *Swann* v. *Board of Education,* 402 U.S. 1, 15-16 (1971). Finally, it is worth noting that of the 49 schools operated during the 1970-71 school year, 42 had a racial composition outside the flexible ratio suggested by the Board itself in its proposed desegregation plan.

What was said concerning the plaintiffs' appeal in *Kelley* is likewise applicable to the appellate issues stated by plaintiff-appellants in this case:

IV Plaintiffs-Appellants' Plan

Our review of this record convinces us that the District Judge's choice of the HEW plan as opposed to plaintiffs' plan was well within his judicial discretion. It may not be ideal, but to us it seems clearly to be a plan for ending a dual school system based on race and substituting therefor a unitary one. It promises to work and to work *now*. *Green* v. *County School Board of Kent County*, 391 U.S. 430 (1968).

V Plaintiffs-Cross-Appellants' Discrimination Claim

Plaintiffs-Cross-appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.

The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6.[1] In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann*. *Swann* v. *Board of Education*, *supra* at 10. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can appropriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

It may be that this is a temporary expedient or it may be that there are practical reasons to justify it for longer duration. In any event, any adverse effects of this aspect of the plan can, of course, likewise be brought to the District Judge's attention when the case is back before him. *Kelley* v. *Metropolitan Board of Education*, *supra* at 25-26 (Slip opinion)

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[1] Plaintiffs-appellants' invidious discrimination claim is far less specific in this case than in *Kelley*.

While the *Kelley* language quoted above disposes of the basic appellate issues brought here by both defendant-appellant and plaintiffs-appellants, a special comment must be made concerning the status of the plan for desegregating the senior high schools. As to the Board of Education's plan in this regard, the District Judge plainly found it unsatisfactory other than as a temporary expedient and ordered another plan to be presented by June 15, 1972 — a date which followed oral argument of this appeal. While I would affirm his order, limited as it is, I would emphasize that no approval is thereby implied as to the Board of Education's plan for the high schools in constitutional terms. I do not consider that any final order concerning a final desegregation plan for the high schools has as yet been presented to us.

I now turn to the appeal by the Board of Commissioners of the City of Chattanooga in No. 72-1443. To the extent that the brief of the Board of Commissioners seeks to argue basically the same issues set forth in the appeal of the Board of Education, said issues are disposed of above. As to the Board of Commissioners' contention that it has been denied due process, some additional facts need to be recited. This record shows that *over six months after the basic order appealed from in this case had been entered on August 5, 1971*, the following events occurred:

Jan. 14, 1972 — Circuit Court of Hamilton County, Tenn. entered an order enjoining the City of Chattanooga from expending funds for purchase of transportation equipment to be used to achieve "racial balance." The state court's ruling followed a complaint filed by a resident of Chattanooga. The state court decided that expenditure of funds by the City for transportation "to

achieve racial balance" contravened TCA 49-2201, which provides:

> "49-2201. Power of boards to provide transportation.—
>
> * * *
>
> "Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another."

Jan. 24, 1972 — The City of Chattanooga declared that it would not appeal the state court injunction and would consider it binding.

Jan. 25, 1972 — The United States District Court ordered plaintiffs to join as defendants in federal suit all parties in state court suit. The District Court also ordered the plaintiffs to petition the court for an order directing the defendants to show cause why they should not be enjoined from complying with the state court injunction.

Jan. 26, 1972 — The City of Chattanooga, the Mayor, the City Commissioners, the City Auditor, the state court plaintiff, Grannan, and counsel in the state court suit were ordered joined as defendants in the District Court proceedings.

Jan. 28, 1972 — Hearing on order to show cause why de-

fendants should not be enjoined from complying with the state court injunction.

Feb. 4, 1972 — District Court entered an order enjoining all parties from seeking either to enforce or to comply with the state court injunction in any manner. Further reports concerning plans for desegregation of the high schools ordered.

Feb. 11, 1972 — The Board of Commissioners filed a motion for new trial or rehearing relating to show cause order of January 28, 1972. City in same motion sought rehearing relating to their responsibility for appropriating funds for purchase of buses.

Feb. 25, 1972 — District Court denies motions for new trial or rehearing.

I do not think that these proceedings pending appeal served to change or alter in any way the posture of the Board of Commissioners in relation to the basic desegregation order of the court. The District Judge's actions were plainly taken to defend the jurisdiction of the court. They were designed only to serve the purpose of freeing the Board of Commissioners from any possible legal restraint that the obviously unconstitutional order of the Circuit Court of Hamilton County might have been thought to have imposed.

Chief Justice Burger's opinion for a unanimous Supreme Court in *Board of Education* v. *Swann*, 402 U.S. 43 (1970), discussed and held constitutionally invalid a North Carolina antibusing statute like TCA 49-2201:

> [T]he flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board*, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann, supra*, at 29, but transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. *Board of Education* v. *Swann, supra* at 46.

I perceive no due process deprivation of any kind concerning the proceedings pending appeal referred to above. (*See Kelley* v. *Metropolitan Board of Education*, — F.2d — (6th Cir. 1972) (Slip opinion p. 24, 30)).

The Board of Education of the City of Chattanooga was and is clearly the proper party defendant in this school desegregation case. The obligations of the Board of Commissioners of the City of Chattanooga imposed by state law pertaining to financing the schools and levying taxes were neither increased nor diminished by the District Judge's orders of January 26, 1972 and February 4, 1972. The Board of Commissioners was intimately aware of this litigation during all its lengthy history. Its efforts to secure

a retrial of the fundamental desegregation order were completely out of time and without merit.

I refrain from extended comment upon Section V of my brothers' opinion entitled *Practicalities*. To me this section seems to be reargument of decisions made by the Supreme Court 17 years ago in *Brown* v. *Topeka, supra,* which have many times been reaffirmed and which this court has no power to overrule. The adverse effects of racially segregated dual school systems are not likely to be overcome without opposition or without inconvenience. Neither "practicality" has ever deterred the United States Supreme Court from ordering the dismantling of such a system by use of a desegregation plan "which promises realistically to work, and promises realistically to work now." *Green* v. *County School Board,* 391 U.S. 430, 438-9 (1968); *Alexander* v. *Board of Education,* 396 U.S. 19 (1969).

The result of my brothers' opinion, unless it is reversed en banc, will be to delay desegregation of the Chattanooga schools by at least another year. But meantime it will mislead many people to expect a change in constitutional law which this court has no power to accomplish.

Typical of the arguments which seem to me to be addressed to overruling *Brown* v. *Topeka, supra,* is reference to the Armor article "The Evidence On Busing." Because I consider it completely irrelevant to our current legal problems, I refrain from comment beyond printing Professor Thomas F. Pettigrew and his co-authors' answer to the Armor article as Appendix B to this opinion.

I would affirm the judgments of the District Court in these appeals.

APPENDIX A

CHAPTER 37

SEGREGATION OF RACES

SECTION.

49-3701—49-3703. [Unconstitutional.]

49-3701—49-3703. [Unconstitutional.]

Compiler's Note. Under the decision of Roy v. Brittain (1956), 201 Tenn. 140, 297 S. W. (2d) 72, the statutes providing for the compulsory separation of races in the field of public education are no longer in effect, and therefore these sections have been omitted. They read:

49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. [Acts 1901, ch. 7, § 1; Shan., § 6888a37; Code 1932, § 11395.]

49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. [Acts 1901, ch. 7, § 2; Shan., § 6888a38; Code, § 11396.]

49-3703. Penalty for violations.—Any persons violating any of the provisions of this chapter, shall be guilty of a

misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00); and imprisonment not less than thirty (30) days nor more than six (6) months. [Acts 1901, ch. 7, § 3; Shan., § 6888a39; mod. Code 1932, § 11397.]

49-3704. [Unconstitutional.]

Compiler's Note. This section was held unconstitutional in Kelly v. Board of Education (1959), 270 Fed. (2d) 209 and is, therefore, omitted. It read:

49-3704. Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race. [Acts 1957, ch. 11, § 1.]

CHAPTER 22—TRANSPORTATION OF SCHOOL CHILDREN

SECTION.

49-2201. Power of boards to provide transportation — Use to achieve racial balance prohibited.
49-2210. Color and markings of buses.
49-2213. Speed limit.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.—Boards of education may provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation

facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education with the approval of the state commissioner of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court; provided further, that said boards in employing school transportation personnel and in contracting for transportation services with persons owning, equipment are hereby authorized to enter into contracts for such services for periods of time as long as, but not exceeding, four (4) years from the date of making such contracts, it being the purpose of this section to permit a reasonable degree of employment security for such school transportation personnel.

Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another. [Acts 1947, ch. 92, § 1; 1949, ch. 233, § 1; C. Supp.

1950, § 2495.1 (Williams § 2495.2); Acts 1957, ch. 10, § 1; 1957, ch. 400, § 1; 1970 (Adj. S.), ch. 491, § 1.]

Amendment. The 1970 amendment added the last paragraph to this section.

Effective Date. Acts 1970 (Adj. S.), ch. 491, § 2. February 27, 1970.

[Note that a statute similar to the proviso in the last paragraph of the statute above was held unconstitutional by the United States Supreme Court. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971).]

APPENDIX B

A BRIEF CRITIQUE OF DR. ARMOR'S "THE EVIDENCE ON BUSING"

Marshall Smith
Harvard University

Elizabeth L. Useem
Boston State College

Clarence Normand
Harvard University

Thomas F. Pettigrew
Harvard University

Release Date to Mass Media: Monday, September 11, 1972.

Publication: To appear as part of rebuttal article in *The Public Interest*, Winter Issue, 1972-1973.

An Overview

The article begins by establishing unrealistically high standards by which to judge the success of the racial desegregation of public schools. "Busing" works only if it leads in one school year to increased achievement, aspirations, self-esteem, interracial tolerance, and life oppor-

tunities for black children. And "busing" must meet these standards in *all* types of interracial schools; no mention or measurement is made of the distinction between merely desegregated and genuinely integrated schools.

This "integration policy model," as it is labeled, is *not* what social scientists who specialize in race relations have been writing about over the past generation. Indeed, these criteria must surely represent the most rigid ever employed for the evaluation of a change program in this history of public education in the United States.

To load the gun further, the anti-busing paper next presents selected findings from selected studies as "*the* evidence on busing." The bias here is two-fold. First, the few studies mentioned constitute an incomplete list and are selectively negative in results. Unmentioned are at least seven investigations from busing programs throughout the nation that meet the methodological criteria for inclusion and report *positive* achievement results for black students. These seven studies are widely known, not obscure, investigations.

Second, only cursory descriptions are provided of the few investigations that are reviewed. Mitigating circumstances surrounding black responses to desegregation are not discussed. For example, we are not told that educational services for the transported black pupils were actually *reduced* with the onset of desegregation in three of the cited cities. In addition, negative findings consistent with the paper's antibusing thesis are emphasized, while positive findings from these same cities are either obscured or simply ignored. Newer studies from three of the cited cities showing more positive results are not discussed.

Positive findings are also obscured by the utilization of an unduly severe standard. Black achievement gains must be statistically significantly greater than white gains for the

paper to regard "busing" a success. But such a standard ignores the possibility that *both* racial groups can make meaningful educational advances in interracial schools. Indeed, this possibility actually occurs in three of the cities mentioned by Dr. Armor. Yet he does not inform us of this dual success of desegregation; rather "busing" is simply rated a failure because the black children did not far outgain the improving white children.

The paper's anti-busing conclusions rest primarily, however not on the incomplete review of the available evidence but on the findings from one short-term study conducted by Dr. Armor himself. This investigation focused on a voluntary busing program in metropolitan Boston called METCO. Yet this study is one of the weakest reported in the paper, for our reexamination of its data finds that it is rife with methodological defects.

Two of the major problems concern deficiencies of the control group employed. To test the effects of "busing" and school desegregation, the control group must obviously consist exclusively of children who are neither "bused" nor attend desegregated schools. But our check of this critical and elementary point reveals that this not the case. Among the 41 control students at the junior and senior high school levels, records on 39 were available; and they reveal that only 16 (41%) of these 39 actually attended segregated school in the tested year of 1968-1969. And most of the 23 desegregated children utilized buses and other forms of vehicular transportation to get to school.

Incredible as it sounds, then, Dr. Armor compared children who were bused to desegregated schools with other children many of whom were also bused to desegregated schools. Not surprisingly, then, he found few differences between them. But this complete lack of controls renders his METCO research of no scientific interest in the study

of "busing" and school desegregation. And since this METCO investigation furnished the chief "evidence" against "busing," Dr. Armor's conclusions are severely challenged by this point alone.

Serious, too, is an enormous non-response rate in the second test administration, a problem alluded to by Dr. Armor only in a footnote. The achievement results for junior and senior high students are rendered virtually meaningless by the participation of only *44%* of the eligible METCO students and *20%* of the eligible "control" students. For the elementary students, only *51%* of the eligible METCO students and *28%* of the eligible "control" students took part in both of the achievement test sessions. Compare these percentages to the generally accepted survey standard of *70 to 80%*, and one can appreciate the magnitude of the selection bias introduced into the METCO results by the widespread lack of participation in the research. Efforts to compensate for these high non-response rates through the use of cross-sectional samples that also suffer from extensive non-response are insufficient.

There are other problems in the METCO study. Besides recording and clerical errors in the data, children were included who initially performed as well as the test scoring allowed and therefore could not possibly demonstrate "improvement" later. In fact, these students comprise one-sixth of all the junior high pupils tested for achievement gains. Moreover, the third administration of the attitude tests were different for the two groups. The METCO students took the tests at school and the "control" students took them at home with their parents as proctors. This faulty research design makes any conclusion about differences in racial attitudes between the two groups hazardous. These and other severe weaknesses of the METCO re-

search, then, are so extensive as to render its findings of no importance in any review of "the evidence on busing."

The inadequate discussion of the METCO study in the article makes it virtually impossible for even the discerning reader to evaluate it properly. We uncovered its many errors only from unpublished earlier materials and from reanalyzing the data ourselves. And this discussion is inadequate in other ways. Differential statistical standards are employed, with less rigorous standards applied to findings congruent with the article's anti-busing thesis. Differences between METCO schools are not shown; and misleading claims of consistency with other research findings are made.

From this assortment of "evidence," Dr. Armor concludes authoritatively that "busing" fails on four out of five counts. It does not lead, he argues, to improved achievement, grades, aspirations, and racial attitudes for black children; yet, despite these failures, he admits that desegregated schools do seem somehow to lead more often to college enrollment for black students.

We review each of these conclusions in detail in our full piece, and find that the picture is considerably more positive, as well as more complex, than that painted by Dr. Armor. For example, when specified school conditions are attained, competent research has repeatedly shown that desegregated, compared to segregated, schools improve the academic performance of black pupils. Other research has demonstrated that rigidly high and unrealistic aspirations actually deter learning; thus, a slight lowering of such aspirations by school desergregation can lead to better achievement and cannot be regarded as a failure of "busing." And "militancy" and "black consciousness and solidarity" are not negative characteristics, as the article asserts, and their alleged development in desegregated schools

should be regarded as a further success, not a failure, of "busing." Moreover, the evidence that desegregated education sharply expands the life opportunities of black children is more extensive than indicated in the article.

Consequently, Dr. Armor's sweeping policy decision against "mandatory busing" is neither substantiated nor warranted. Apart from the impairments and incompleteness of the cited "evidence," the paper in a real sense is not about "busing," much less "mandatory busing." Three of the cities discussed, including the primary discussion of Boston, had *voluntary*, not "mandatory," "busing." "Busing" was never cited as an independent variable, and many of the desegregation studies discussed involved some children who were not "bused" to reach their interracial schools. Indeed, in Dr. Armor's own investigation of METCO, many of the METCO children were not "bused" while many of the "controls" were.

Finally, objections must be raised to the basic assumptions about racial change that undergird the entire article. The racial desegregation of the public schools is regarded as largely a technical matter, a matter for social scientists more than the courts to decide. The emphasis is placed solely upon the adaptive abilities of black children rather than on their constitutional rights. The whole national context of individual and institutional racism is conveniently ignored, with interracial contact under any conditions assumed to be "integration." We are surprised such assumptions still prevail in social science in 1972; and we trust that readers will not judge the potential usefulness of competent social research to public policy by this unfortunate example.

Nos. 71-2006, 71-2007, 72-1443 & 72-1444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, ET AL.,
Plaintiffs-Appellants and Cross-Appellees,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, ETC., ET AL.,
Defendant-Appellee and Cross-Appellant.

APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed April 30, 1973.

Before: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, McCREE, MILLER, KENT and LIVELY, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge, in banc.

PER CURIAM. This is a school desegregation case involving the school system of Chattanooga, Tennessee.

The present appeals are from the decisions of District Judge Frank W. Wilson reported in 329 F. Supp. 1374 (E.D. Tenn. 1971) and 341 F. Supp. 193 (E.D. Tenn. 1972). Appeals have been perfected by the City Board of Education and by the City of Chattanooga and its Mayor. An appeal also has been perfected by the plaintiffs from

the decision reported at 329 F. Supp. 1374 (E.D. Tenn. 1971).

The appeals originally were heard by a panel of three judges of this court, whose decision was announced on October 11, 1972. The majority opinion of the panel remanded the case to the District Court for further consideration. The dissenting opinion favored affirmance of the judgments of the District Court. Thereafter, a majority of the judges of this court who are in regular active service ordered that the appeals be reheard by the court in banc. FED. R. APP. P. 35, Local Rule 3 (b) of this court provides that: "The effect of the granting of a rehearing in banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal."

The comprehensive reported opinions of District Judge Wilson contain a full statement of the issues and pertinent facts, and repetition in this opinion is not required.

Upon consideration of the briefs of the parties, the oral arguments before the court sitting in banc, and the entire record, we affirm the judgments of the District Court for the reasons stated in the opinions of Judge Wilson. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis* v. *Board of Commissioners*, 402 U.S. 33 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *Brown* v. *Board of Education* [*II*], 349 U.S. 294 (1955), *Brown* v. *Board of Education* [*I*], 347 U.S. 483 (1954); *Northcross* v. *Board of Education of Memphis City Schools*, 466 F.2d 890 (6th Cir. 1972); *Kelley* v. *Metropolitan Board of Education of Nashville & Davidson County, Tennessee*, 463 F.2d 732 (6th Cir.), *cert. denied* 409 U.S. 1001 (1972); *Davis* v. *School District of City of Pontiac*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

The Board of Education has filed a supplemental record in this court containing statistics said to reflect changes which have occurred after the decisions of the District Court. We decline to consider these statistics in the present appeal. Appropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court. We reemphasize the holding of this court in *Kelley* v. *Metropolitan Board of Education of Nashville and Davidson County, supra*: "Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances." 463 F.2d at 745-46.

Affirmed. Since both parties appealed, no costs are taxed.

MILLER, Circuit Judge, concurring in the result.

I concur in the result reached by the Court in these appeals.

As I read the opinion of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), where vestiges of state-imposed segregation still exist, the district courts have broad powers to fashion remedies that will assure a unitary school system.

A careful review of the record in this case indicates to me that the district judge was not only clearly justified in holding that vestiges of state-imposed segregation still existed in the Chattanooga system, but that he did not abuse his discretion in fashioning remedies within the precepts of the *Swann* decision. Since for these reasons I concur in the result, I do not feel committed to all of the language, reasons and conclusions set forth in the per curiam opinion of this Court or in the two opinions of Judge Wilson under review reported at 329 F.Supp. 1374 (E.D. Tenn., 1971) and 341 F.Supp. 193 (E.D. Tenn., 1972).

WEICK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge, dissenting.

As members of the original panel who wrote the majority opinion from which the en banc hearing was ordered, we respectfully dissent.

Following the en banc hearing, the District Court's opinion was affirmed, per curiam, without, in our opinion, adequate discussion of the assignment of errors or the merits of substantial and important issues raised on appeal by the School Board and the Board of Commissioners of the City of Chattanooga. The Commissioners were the taxing authority; however, the Board of Commissioners was not made a party initially, but has since been made a party to the judgment without affording it an opportunity to question the merits of the case.

No consideration was given to the supplemental record certified to this Court by the District Court indicating substantial changes in conditions affecting the school system, brought about by mobility of both white and black families, which changes in our judgment impel a remand for consideration before we place our stamp of approval on the District Court's opinions.

We consider it right to say preliminarily that, in our view, no decision of the United States Supreme Court has held that in all events *and without reference to the good faith and good conduct of the involved school or other state or municipal authorities*, there must always be bussing to bring about a mix of the races. *Goss* v. *The Bd. of Educ. of the City of Knoxville, Tenn.*, — F.2d — (6th Cir., No. 72-1766-1767, decided Mar. 29 1973).

In the case before us, the District Judge found that the Chattanooga School Board was guilty of no bad faith and that up to February 4, 1972, the Board had, in fact, established a unitary school system "within which no person is

to be effectively excluded from any school *because of race or color.*" This was the command of *Alexander* v. *Holmes County Board of Educ.*, 396 U.S. 19, 20 (1969).

The District Judge's opinion dealing with the Chattanooga Board's good faith (not reported) had this to say:

> "This lawsuit has been in an area *where the law has been evolving*, and the Court cannot say that the defendants have acted in bad faith in failing always to *perceive* or *anticipate* that *development* of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green* v. *School Bd. of New Kent County*, 391 U.S. 430 . . . (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court." (Emphasis added).

There seems now to have developed a view that since *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), nothing other than bussing will satisfy the original command of *Brown I* and *Brown II*. This is not so. In the *Swann* decision the District Court found that the school authorities there involved had flouted the *Brown* commands. His opinion cannot be read as other than a finding that the school authorities were deliberately maintaining *de jure* segregation. The opposite is true in Chattanooga. *Swann* did no more than affirm the District Judge's finding of deliberate creation or perpetuation of *de jure* segregation.

We do not read *Swann* as holding that the Constitution requires that, black or white, a school child must now be

denied the right to attend the school of his choice – desirable because of its nearness to his place of residence, or for any other circumstance prompting such choice – *solely because of the color of his skin.* In our view such a holding would collide with the commands of *Brown I and Brown II,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

Can obedience to *Brown I* and *Brown II* be accomplished only by imposition of an Attainder upon so many whose only contribution to the wrongs sought to be alleviated by *Brown* derives from the circumstance of their birth? What will be the dimensions of such selective attainting of some, but not others, among the groups that make up our total society?

We have set out above that the District Judge believed that in Chattanooga the schools had been desegregated and that a unitary system had been established. We have affirmed such holding. *Mapp* v. *Board of Educ. of City of Chattanooga,* 373 F.2d 75 (1967).

The District Judge then went on to say:

> "This lawsuit has been in an area where the law has been evolving and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law."

Must every School Board now be expected, clairvoyantly, to guess what new judicial device may be considered by a District Judge to be a better way of serving desegregation, and make fresh adjustments if such device is found permissible by some appellate court? Across the nation, especially in the cities, rapid population shifts have brought about new concentrations of racial groups. Must the courts be ready to move in with fresh commands and new rerouting of buses? The chaos that can be the result is forecast by Chief Justice Burger's language in *Swann.*

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; *but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools,* further intervention by a district court should not be necessary." (Emphasis added.) (402 U.S. at 31, 32.)

We must therefore consider the issues raised on appeal.

I

THE QUOTA SYSTEM

The District Court misconstrued recent decisions of the Supreme Court as requiring racial quotas in the public schools. It ordered "a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions . . . ." 329 F. Supp. 1374, 1382. The five schools excepted therefrom were found not to be imbalanced on account of past or present discrimination. Similar quotas were ordered for Junior High Schools. Senior High Schools are still under consideration.

In our opinion, the decision in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971), on which the District Court relied, does not mandate the adoption of

quotas in each and every school in the system regardless of where the children reside.

Mr. Chief Justice Burger, who wrote the opinion for the Court said:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must alw s reflect the racial composition of the school system a whole." (402 U.S. at 24).

In *Winston-Salem/Forsyth Bd. of Educ.* v. *Scott*, 404 U.S. 1221 (1971), in an Opinion in Chambers, Chief Justice Burger, after quoting the above language from *Swann*, stated:

> "Nothing could be plainer, or so I had thought, then *Swann's* disapproval of the 71%-29% racial composition found in the *Swann* case as the controlling factor in the assignment of pupils, simply because that was the racial composition of the whole school system." (404 U.S. at 1228).

Chief Justice Burger further said:

> "The present status of the findings is not clear to me, but the District Court on reconsideration following the remand seems to have thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in *Swann* suggests a possible confusion on this point. I do not attempt to construe that language, but simply to recite it verbatim: 'The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of

the school system as a whole.' 402 U.S. at 24." (404 U.S. at 1230-1231).

In *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *affirming* 244 F.Supp. 572 (S.D. Ohio, 1965), *cert. denied*, 389 U.S. 847, we stated:

> "Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958); Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); Ex parte State of Virginia, 100 U.S. 339, 25 L.Ed. 676 (1879); Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).
>
> However, it is equally clear that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which is to try him nor on the venire or jury roll from which petit jurors are to be chosen. Swain v. State of Alabama, 380 U.S. 202, 208, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Akins v. State of Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). While the two situations may not be completely analogous, the potential dangers to a criminal defendant, forced to face a racially imbalanced jury, are at least as great as the intangible, often speculative injuries threatening a student in a racially imbalanced school." (369 F.2d at 61-62).

The trouble is that the quota system, which in our

judgment is alien to a free country, has been extended to other fields and with discriminatory and disastrous results.[1]

We see no occasion for the District Judge to rely on the drastic order of Judge McMillan considered in *Swann, supra*, or that of Judge Merhige, reversed in *Bradley*.[2]

The District Court was obviously influenced by the fact that the Supreme Court in *Swann* affirmed a very broad order of District Judge McMillan. This appears from a colloquy between the Court and counsel for the Board, at the evidentiary hearing, as follows:[3]

> "THE COURT: Well, what is your question about what they did? Did they or did they not approve all of the procedures that had been followed in the Mecklenburg case?
>
> MR. WITT: They placed great –
>
> THE COURT: Well, just answer my question, did they or did they not approve every single procedure followed in the Mecklenburg case.
>
> MR. WITT: Yes.
>
> THE COURT: So is there any question about what they did?
>
> MR. WITT: Yes." (Tr. 1693-19-20)

But the Supreme Court in *Swann* pointed out the background of defiance by that Board which occasioned the broad order:

> "As the voluminous record in this case shows, the predicate for the District Court's use of the 71% –

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[1] Ross, "Why Quotas Won't Work," Reader's Digest, Feb. 1973, page 51: "Current effort to atone for past discrimination against minorities is creating new victims by reverse discrimination. Can two wrongs make a right?"

[2] *Bradley* v. *School Board of Richmond*, 462 F. 2d 1058 (4th Cir. 1972), *cert. granted*, Jan. 15, 1973, 41 U.S.L. Week 3391.

[3] See 83 Harvard Law Review 81, 82.

29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, *that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge, who, on at least three occasions, urged the board to submit plans.*" (Emphasis added.) (Footnotes omitted) (402 U.S. at 24).

In our case, prior to the entry of the orders from which these appeals had been taken, no child was excluded from any school on account of color or race. The District Court found that the Board has acted in good faith and has at all times "complied or attempted to comply with the orders and directions of the Court." The Board was not in default. This distinguishes *Swann*.

The quota system results in the violation of the constitutional rights of innocent black children and white children in order to redress past violations of the constitutional rights of the plaintiffs. Both black and white children, without their consent or that of their parents, are forced by judicial fiat to be transported away from their homes and neighborhood schools to other strange places and schools, solely because of the color of their skin. These innocent children have committed no offense to justify such treatment.[4] Plaintiffs seem to recognize this fact because one of the assignments of error in their appeal was their claim that the District Court erred in ordering the closing of black schools without ordering a sufficient number of white schools closed. Plaintiffs' brief states:

[4] Many black people oppose forced bussing of their children. At the National Black Political Convention, held in Gary, Indiana (March, 1972), mandatory bussing and school integration were condemned as racist and as preserving a black minority structure.

> "Thus, black youngsters will be required to leave their neighborhoods to go to other schools for all grades or for grades 1-3 in numbers disproportionate to the numbers of blacks." (Plaintiff-Appellants' brief, p. 30).

There is no provision in the Constitution which can be read as saying that the races must be mixed in each and every school in the system, and no provision requiring that white children be bussed away from their neighborhood schools in the suburbs, to schools in the inner city, or that black children must be bussed away from their neighborhood schools to schools in the suburbs, in order to achieve a racial mixture or quota.

The Board can hardly be faulted for housing patterns of a community or for the concentration of blacks in the inner city, as these conditions exist in other cities throughout the country, regardless of the type of school system in operation, *i.e.*, whether *de jure* or *de facto*.

In his book, "Negroes In Cities," Dr. Karl Taeuber states that residential segregation exists "regardless of the character of local laws and policies and regardless of other forms of discrimination." He said substantially the same thing in his article, "Residential Segregation," in the August, 1965 issue of Scientific American.

In *Bradley* v. *School Board of City of Richmond*, 462 F.2d 1058 at 1066, (4th Cir. 1972), *cert. granted*, Jan. 15, 1973, 41 U.S.L.Week 3391, the Court said:

> "[T]he root causes of the concentration of blacks in the inner city are simply not known . . . ."

And

> "Whatever the basic causes, it has not been school assignments and school assignments cannot reverse that trend."

It is, of course, popular to blame the Boards of Education for everything, but it is unfair to require the educational system to dismantle this condition for which it was in no wise responsible.

II

UNITARY SCHOOL SYSTEM

Unlike the District Court, we have experienced difficulty in understanding not only what constitutes a unitary school system, but also what steps the Constitution requires must now be taken to eliminate a *de jure* system and to bring about a unitary system. Other Judges, legal scholars and writers have had similar difficulty.[5] We suggested in *Northcross* that the Supreme Court had not defined a unitary school system. *Northcross* v. *Board of Educ. of Memphis, Tenn. City Schools*, 420 F.2d 546 (6th Cir. 1969). We were corrected in a concurring opinion written by Chief Justice Burger, wherein he said:

> "The suggestion that the Court has not defined a unitary school system is not supportable. In *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), we stated, albeit perhaps too cryptically, that a unitary system was one 'within which no person is to be effectively excluded from any school *because of race or color.*'" *Northcross* v. *Bd. of Educ. of Memphis, Tenn.*, 397 U.S. 232 at 236-7 (1970). (Emphasis added).

Under this definition the School Board already had achieved a unitary system long before the entry of the orders from which the appeals were taken. While this did not establish racial quotas, or a mixture in all of the

[5] 85 Harvard Law Review 3, 74, 76, 81, 83.

schools as desired by plaintiffs, *no pupil was excluded from any school on account of his color or race.* This is all that *Brown I* and *Brown II* ever contemplated.[6] These decisions, in our judgment, did not envision the use of school children to bring about an integration of the races.

III

MAXIMIZING INTEGRATION

The District Court required the Board to establish that it had taken affirmative action to "maximize integration" in all feasible ways as required by *Kelley*[7] and *Robinson*.[8] The Supreme Court in *Davis* v. *Board of School Comm'rs of Mobile County*, 402 U.S. 33 (1971), held that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." (402 U.S. at 37). We have not found where the Supreme Court has ever required School Boards to "maximize integration". The difficulty is that the District Court may well have understood the words to require integration of the races by fixed numbers or quotas in each public school in the system, regardless of where the pupils live, and regardless of their economic circumstances. This can be accomplished only by extensive and expensive bussing and by violation of the constitutional rights of both races.

If it is desirable to integrate the races, why not start with adults, rather than to pick on defenseless school children? Of course, it would take an Act of Congress to

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[6] *Brown I*, 347 U.S. 483 (1954); *Brown II*, 349 U.S. 294 (1955).

[7] *Kelley* v. *Metropolitan County Bd. of Educ. of Nashville & Davidson County*, 436 F.2d 856 (6th Cir. 1970).

[8] *Robinson* v. *Shelby County Bd. of Educ.*, 442 F.2d 255 (6th Cir. 1971).

compel adults to integrate. We doubt that Congress could ever be persuaded to pass such legislation, and if it were so persuaded, such law would clearly be unconstitutional, in violation of the First Amendment which guarantees freedom of association. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958).

In that case the Court denied enforcement of a state contempt citation against the petitioner, which citation was issued when petitioner refused to disclose its Alabama membership list. The adverse effect on the membership of disclosure of the roster of N.A.A.C.P. was, of course, somewhat speculative. Yet the Court held that the importance of the right of association was so great as to require protection, stating:

> ". . . [S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (357 U.S., at 460-461).

This principle was reaffirmed in *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). The language in the concurrence of Mr. Justice Black and Mr. Justice Douglas, is instructive.

> ". . . [W]e believe, as we indicated in *United States* v. *Rumely*, 345 U.S. 41, 48, at 56 (concurring opinion), that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right as *N. A. A. C. P.* v. *Alabama*, 357 U.S. 449, at 460, and *De Jonge* v. *Oregon*, 299 U.S. 353, at 363, hold. These are principles applicable to *all* people under our Constitution irrespective of their race, color, politics, or religion." (Emphasis added) 361 U.S. at 528.

"*All* people" includes children.

It should be pointed out that there is a marked difference between voluntary bussing and induced or forced bussing in the effect on the children involved and their parents. No one can have any objection to the school system's furnishing voluntary transportation from the child's residence to the school nearest thereto. It is something entirely different when the child, solely because of the color of his skin, is assigned away from his neighborhood school, by a court order, and is required to be transported to another school (whether by his parents' car or by induced bussing) some distance away from his home.

Brown I speaks of the feeling-of-inferiority effect on children as the result of discriminatory state action where the children are not permitted to attend certain public schools because of the color of their skin. This condition would seem to persist still if children of both races are prohibited by court order from attending schools nearest to their residences, merely because of the color of their skin, and are required to be taken elsewhere to school.

IV

BURDEN OF PROOF

Where a dual system has been maintained, the courts have placed the burden of proof upon the School Board to establish that present racial imbalances in a particular school are not the result of past discriminatory actions, although the cases are not very clear as to just how or in what manner the Board can ever meet such a heavy burden. But in a case like ours, where the Board has always complied with the desegregation orders of the Court, and the plaintiffs have filed motions for further relief whenever new decisions have been announced expanding the rights

of plaintiffs in school desegregation cases, it would seem to us to be only fair that plaintiffs should have the burden to prove that they are entitled to such further relief. The Board ought not to have the burden of disproving every contention which the plaintiffs may see fit to make in this case. In our judgment the Court erred in placing on the defendants the burden of proof in resisting plaintiffs' motion for further relief.

V

PRACTICALITIES

In considering desegregation plans the District Court must take into account the practicalities of the proposals. These include the cost thereof, how such proposals may affect the rights of the children involved in the assignments, induced bussing, and the educational achievement of such proposals.

Boards of Education do not have unlimited funds to adopt any program which they please. Funds can be raised by taxation and appropriation. In the present case the Board of Education does not have the power to levy taxes or to appropriate funds to carry out its programs. Only the Board of Commissioners of the City has such power and authority. That Board was not made a party to the case in the District Court until after the desegregation orders had been entered by the Court. We would assume that the Board of Commissioners has already appropriated the funds for the 1972-73 school year. If so, we do not know how an expenditure of $500,000 for buses would affect operation of the schools. The District Court has not ordered the Board of Commissioners to appropriate funds to provide for transportation of pupils, and we do not consider in this appeal the question whether it has the power

to enter any such order. The Board of Commissioners is entitled, on remand, to a hearing on all issues of the case before any order is entered against it.

We would not affirm the District Court's opinions, but would remand for an evidentiary hearing to consider the changed circumstances and to proceed not inconsistent with this opinion.

The District Court also should consider Title VIII of the Education Amendments of 1972, and its prohibition against the use of funds appropriated by Congress for bussing.

In our judgment a quota system can discriminate invidiously in favor of one race against other races. Such a system can lower the quality of education and educational achievement, and instead of bringing harmony and good will between the races can polarize them.